In The Supreme Court of the United States

VALERIE PLAME WILSON; JOSEPH C. WILSON, IV,

Petitioners,

v.

I. LEWIS LIBBY, JR.; KARL C. ROVE, RICHARD B. CHENEY; RICHARD L. ARMITAGE; JOHN DOES 1-9

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Whether there are "special factors counseling hesitation" precluding constitutional claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when no federal statute applies or provides any possible remedy for plaintiffs, and when there is no more than speculation that litigation might lead to the disclosure of classified information.

PARTIES TO THE PROCEEDINGS

The plaintiffs in this action are Valerie Plame Wilson and Joseph C. Wilson, IV. The defendants are I. Lewis Libby, Jr., Karl C. Rove, Richard B. Cheney, Richard L. Armitage, and John Does, 1-9.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup Ct. R. 29.6, Petitioner Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a 10% orgreater ownership interest in CREW.

(b) CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensuring the integrity of those officials. Among its principle activities, CREW routinely requests information from government agencies under the Freedom of Information Act (FOIA) and pursues its rights to information under the FOIA through litigation. CREW then disseminates, through its website and other media, both documents it receives in response to its FOIA requests and written reports based in part on those documents and information obtained through other administrative processes.

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The opinion of the United States District Court for the District of Columbia granting the defendants' motion to dismiss for failure to state a claim is published at 498 F. Supp. 2d 74 (D.D.C. 2007), and is reprinted at Appendix ("App.") 55a.

The opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the district court, in a 2-1 decision, is published at 535 F.3d 697 (D.C. Cir. 2008), and is reprinted at App. 1a.

The order denying rehearing and rehearing *en banc* is unpublished and reprinted at App. 108a, 110a.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals denying the petition for en banc review was issued on November 17, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law. . . ."

The Privacy Act is found at 5 U.S.C. § 522a.

STATEMENT OF THE CASE

This is a case about abuse of power at the highest level of American government. Plaintiffs Valerie Plame Wilson and Joseph C. Wilson, IV have alleged the defendants intentionally revealed Ms. Wilson's status as a secret operative for the Central Intelligence Agency in retaliation for Mr. Wilson exposing false statements in the President's State of the Union Address. The plaintiffs seek money damages as compensation for the substantial harms they have suffered from the violations of their constitutional rights.

Plaintiffs' complaint, filed in the United States District Court for the District of Columbia, alleged government officials violated Mr. Wilson's First Amendment right to freedom of speech by retaliating against him for his constitutionally protected expression; denied equal protection to Mrs. Wilson by treating her differently from other government employees who were similarly situated[1];

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[1] Subsequent to the decisions of the district court and the court of appeals in this case, this Court ruled that government employees cannot bring such "class of one claims." *Engquist v. Oregon Dep't of Agriculture*, 128 S. Ct. 2146 (2008). Appellants thus acknowledge this particular claim is no longer viable.

denied Mrs. Wilson property without due process of law; and deprived Mr. and Mrs. Wilson of their constitutionally protected right to privacy.[2] The Wilsons seek damages from the defendant federal officials for constitutional violations pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

The United States District Court for the District of Columbia granted the defendants' motion to dismiss for failure to state a claim. App. at 55a. The district court concluded there were special factors counseling hesitation that precluded a *Bivens* suit for constitutional violations including the Privacy Act, 5 U.S.C. § 522a, and the danger of revealing sensitive information.

The United States Court of Appeals for the District of Columbia Circuit, in a 2-1 decision, affirmed the district court's decision and its reasons for dismissing the constitutional claims as barred under *Bivens* because of "special factors counseling hesitation." App. at 1a.

The plaintiffs then sought rehearing and rehearing *en banc*. On November 17, 2008, this motion was denied. App. at 108a, 110a.

STATEMENT OF THE FACTS

Valerie Plame Wilson was an employee of the CIA until January 2006. Her employment status

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[2] Mr. and Mrs. Wilson also sued for infringement of their common law right to privacy. They do not seek certiorari on the dismissal of this claim.

was classified and was not publicly known until July 14, 2003, when a press report precipitated by leaks by the defendants revealed her status and exposed her. (Amended Complaint, ¶ 7).[3]

Joseph C. Wilson, IV is married to Valerie Plame Wilson. From 1976 through 1998, Mr. Wilson was a member of the United States Diplomatic Service. From 1988 to 1991, he was the Deputy Chief of Mission at the United States Embassy in Baghdad, Iraq. In that position, he was recognized as "truly inspiring" and "courageous" by President George H. W. Bush after he shielded more than 50 Americans at the Embassy in the face of threats from Saddam Hussein to execute anyone who refused to turn over foreigners. Mr. Wilson later served as United States Ambassador to Gabon and Sao Tome and Principe under President George H. W. Bush and as Senior Director for Africa at the National Security Council under President Clinton. (*Id.*, ¶ 8).

This lawsuit arises from actions by the defendants, officials at the top level of American government, to punish Mr. Wilson by exposing his wife's status as an operative of the CIA and thereby destroy her career. The defendants sought to do this in retaliation for Mr. Wilson, in an op-ed article in the *New York Times* and in comments to the media,

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[3] Since the District Court dismissed this case for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction, all of the allegations in plaintiffs' Amended Complaint must be taken as true. *See, e.g., S.E.C. v. Edwards*, 540 U.S. 389, 391 n. (2004) (in considering a motion to dismiss a court shall accept as true all of the allegations of the complaint.)

exposing inaccurate statements in President George W. Bush's State of the Union Address on January 28, 2003. In that speech, President Bush stated "[t]he British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." (the "sixteen words").

The initial revelations of Mr. Wilson's report

On May 6, 2003, the *New York Times* published a column by Nicholas Kristof disputing the accuracy of the "sixteen words" in the State of the Union Address. The column reported that as a result of a request from the vice president's office for an investigation of allegations Iraq sought to buy uranium from Niger, an unnamed former ambassador -- now known to be Plaintiff Joseph C. Wilson, IV -- was sent on a trip to Niger in 2002 to look into the matter. According to the column, in early 2002 the former ambassador reported back to the CIA and State Department that the allegations were unequivocally wrong and based on forged documents. (*Id.*, ¶ 19b).

On or about May 29, 2003, in the White House, Mr. Libby asked an undersecretary of State for information concerning the unnamed former ambassador's travel to Niger to investigate claims about Iraqi efforts to acquire uranium yellowcake. (*Id.*, ¶ 19c). On or about June 9, 2003, a number of classified documents from the CIA were faxed to the Office of the Vice President to the personal attention of Mr. Libby and another person in the Office of the Vice President. The faxed documents, which were marked as classified, discussed, among other things,

Joseph Wilson and his trip to Niger, but did not mention him by name. After receiving these documents, Mr. Libby and one or more other persons in the Office of the Vice President handwrote the names "Wilson" and "Joe Wilson" on the documents. (Amended Complaint, ¶ 19d).

On or about June 11 or 12, 2003, the undersecretary of State orally advised Mr. Libby that Mr. Wilson's wife worked at the CIA and that State Department personnel were saying Mr. Wilson's wife was involved in the planning of his trip. (*Id.*, ¶ 19e). Around the same time, Mr. Libby spoke with a senior officer of the CIA to ask about the origin and circumstances of Mr. Wilson's trip and was advised by the CIA officer that Mr. Wilson's wife worked at the CIA and was believed [erroneously] to be responsible for sending Wilson on the trip. (*Id.*, ¶ 19f).

Prior to June 12, 2003, *Washington Post* reporter Walter Pincus contacted the Office of the Vice President in connection with a story he was writing about Mr. Wilson's trip. (*Id.*, ¶ 19g). At about the same time, Vice President Cheney advised Mr. Libby that Mr. Wilson's wife worked at the CIA in the Counterproliferation Division. Mr. Libby understood the vice president had learned this information from the CIA. (Amended Complaint, ¶ 19h).

On June 12, 2003, the *Washington Post* published an article by reporter Walter Pincus about Mr. Wilson's trip to Niger, which described Mr. Wilson as a retired ambassador but did not name

him, and reported the CIA had sent him to Niger after an aide to the vice president raised questions about purported Iraqi efforts to acquire uranium. Mr. Pincus' article questioned the accuracy of the portion of President Bush's State of the Union Address concerning Iraq seeking to purchase uranium and stated the retired ambassador had reported to the CIA the uranium purchase story was false. (*Id.*, ¶ 19i).

On or about June 14, 2003, Mr. Libby met with a CIA briefer. During their conversation, Mr. Libby discussed with the briefer, among other things, "Joe Wilson" and his wife "Valerie Wilson," in the context of Mr. Wilson's trip to Niger. (*Id.*, ¶ 19j).

On or about June 23, 2003, Mr. Libby met with *New York Times* reporter Judith Miller. During this meeting, Mr. Libby was critical of the CIA, and in discussing the CIA's handling of Mr. Wilson's trip to Niger informed Ms. Miller that Mr. Wilson's wife might work at a bureau of the CIA. (*Id.*, ¶ 19m).

Mr. Wilson's Op-ed

On July 6, 2003, the *New York Times* published an op-ed article by Mr. Wilson entitled "What I Didn't Find in Africa." On that same day, the *Washington Post* published an article about Mr. Wilson's 2002 trip to Niger, which was based in part on an interview with Mr. Wilson. Mr. Wilson also appeared as a guest on the July 6 television interview show "Meet the Press." In his op-ed article, and in interviews with print reporters and on television, Mr. Wilson explained he had taken a trip

to Niger at the request of the CIA in February 2002 to investigate claims Iraq had sought or obtained uranium yellowcake from Niger but had found no evidence to support these allegations. Mr. Wilson stated he believed, based on his understanding of government procedures, the Office of the Vice President had been advised of the results of his trip. (Amended Complaint, ¶ 19n).

In a May 12, 2006 court filing in *United States v. Libby*, the government proffered a copy of the July 6 op-ed annotated shortly after its publication in the handwriting of Vice President Cheney. The government indicated its belief those notes of the vice president "support the proposition that publication of the Wilson Op-Ed acutely focused the attention of the Vice President and [Libby] -- his chief of staff -- on Mr. Wilson, on the assertions made in his article, and on responding to those assertions." (*Id.*, ¶ 19o).

The retaliation

Following the publication of Mr. Wilson's op-ed piece and statements in the national media, the defendants engaged in a concerted effort to retaliate against Mr. Wilson by exposing his wife's employment as an operative for the CIA. On or about July 7, 2003, Mr. Libby had lunch with the then-White House press secretary and advised the press secretary Mr. Wilson's wife worked at the CIA and noted such information was not widely known. (*Id.*, ¶ 19p).

On or before July 8, 2003, Vice President Cheney advised Mr. Libby the President of the United States specifically had authorized Mr. Libby to disclose to *New York Times* reporter Judith Miller certain information from an October 2002 National Intelligence Estimate concerning Iraq and weapons of mass destruction in order to rebut Mr. Wilson. Just three days later, on July 11, 2003, Director of Central Intelligence George Tenet conceded claims about Iraqi attempts to buy uranium from Africa in the January 2003 State of the Union Address were a mistake and the "16 words should never have been included in the text written for the President," an acknowledgment the substance of Mr. Wilson's criticism was legitimate and correct. (*Id.*, ¶ 19q).

Rather than admit the validity of Mr. Wilson's criticisms, on or about the morning of July 8, 2003, Mr. Libby met with Ms. Miller. In speaking with her, Mr. Libby discussed Mr. Wilson's trip and criticized the CIA reporting concerning it. During this discussion, Mr. Libby advised Ms. Miller of his belief Mr. Wilson's wife worked at the CIA. (Amended Complaint, ¶ 19r).

On or about July 10 or July 11, 2003, Mr. Libby spoke to a senior official in the White House, believed to be Karl Rove or one or more of John Does No. 1 - 9, who advised Mr. Libby of a conversation earlier that week with columnist Robert Novak in which Mr. Wilson's wife was discussed as a CIA employee involved in Mr. Wilson's trip. Mr. Libby was advised Mr. Novak would be writing a story about Mr. Wilson's wife. (*Id.*, ¶ 19u).

On or about July 12, 2003, Mr. Libby flew with the vice president and others to and from Norfolk, Virginia, on Air Force Two. On his return trip, Mr. Libby discussed with other officials aboard the plane what Mr. Libby should say in response to certain pending media inquiries, including questions from *Time* reporter Matthew Cooper. (*Id.*, ¶ 19v).

On or about July 12, 2003, in the afternoon, Mr. Libby spoke by telephone with Mr. Cooper, who asked whether Mr. Libby had heard Mr. Wilson's wife was involved in sending Mr. Wilson on the trip to Niger. Mr. Libby confirmed to Mr. Cooper, without elaboration or qualification, he had heard this information too. (*Id.*, ¶ 19w). On the same day, Mr. Libby spoke by telephone with Ms. Miller of the *New York Times* and discussed Mr. Wilson's wife and that she worked at the CIA. (Amended Complaint, ¶ 19x).

Around the same time, other defendants similarly revealed Mrs. Wilson's employment at the CIA in an attempt to punish her and Mr. Wilson. For example, on Friday, July 11, 2003, Mr. Cooper telephoned Karl Rove at the White House. In the ensuing conversation, Mr. Rove instructed Mr. Cooper the conversation was to be on "deep background," which Mr. Cooper has stated he understood to mean he could use the information Mr. Rove was giving to him but could not quote Mr. Rove, and that he was required to keep the identity of the source confidential. (*Id.*, ¶ 27).

In the same telephone conversation, Mr. Rove clearly indicated to Mr. Cooper that Mrs. Wilson

worked "at the agency," which Mr. Cooper understood to mean the CIA. Mr. Rove also told Mr. Cooper that Mrs. Wilson "worked on 'WMD' [weapons of mass destruction]" issues and was responsible for sending Mr. Wilson to Niger. This was the first time Mr. Cooper had heard anything about Mr. Wilson's wife. (*Id.*, ¶ 28). Mr. Cooper has said he has a distinct memory of Mr. Rove ending the call by saying, "I've already said too much." (*Id.*, ¶ 29).

In July 2003, shortly after Mr. Novak's column appeared, Mr. Rove called Chris Matthews, host of the MSNBC network program "Hardball," and told him Mr. Wilson's wife was "fair game." "Fair game" is a hunting term used to describe prey (an animal that is killed and eaten) and is used colloquially to describe a person who may legitimately be attacked. Again, Mr. Rove attempted to make this statement targeting Mrs. Wilson off the record on the condition he not be identified as its source, so as to avoid detection for the wrongdoing. (Amended Complaint, ¶ 30).

Similarly, Deputy Secretary of State Richard Armitage participated in exposing Mrs. Wilson in an attempt to punish Mr. Wilson. On or about June 10, 2003, Mr. Armitage received a memorandum prepared by an analyst in the State Department's Bureau of Intelligence and Research that referred to Mrs. Wilson as a CIA WMD manager. The memorandum was stamped "Secret" and the paragraph that mentioned Mrs. Wilson was prefaced with the letters "S/NF," meaning Secret/No Foreigners. (*Id.*, ¶ 36).

On or about June 13, 2003, Mr. Armitage met with reporter Bob Woodward. During the course of that meeting, Mr. Armitage told Mr. Woodward that Mrs. Wilson worked at the CIA as an analyst on weapons of mass destruction. On July 8, 2003, Mr. Armitage met with reporter Robert Novak and revealed to Mr. Novak that Mrs. Wilson worked for the CIA on weapons of mass destruction. (*Id.*, ¶ 39).

These actions of the defendants were the product of a concerted effort to punish Mr. Wilson for embarrassing the Bush administration by revealing a crucial misstatement in the President's State of the Union Address. On October 28, 2005, Special Counsel Patrick Fitzgerald explained at a press conference announcing the indictment against Mr. Libby: "In July 2003, the fact that Valerie Wilson was a CIA officer was classified. Not only was it classified, but it was not widely known outside the intelligence community. Valerie Wilson's friends, neighbors, college classmates had no idea she had another life. The fact that she was a CIA officer was not well known for her protection and for the benefit of all of us. It is important that a CIA officer's identity be protected, that it be protected not just for the officer, but for the nation's security." (*Id.*, ¶ 21).

At the same press conference, Special Counsel Fitzgerald also stated: "Valerie Wilson's cover was blown in July 2003. The first sign of that cover being blown was when Mr. Novak published a column on July 14th, 2003. But Mr. Novak was not the first reporter to be told that Wilson's wife, Valerie Wilson, Ambassador Wilson's wife Valerie,

worked at the CIA. Several other reporters were told [by Libby]." (Amended Complaint, ¶ 33).

Mr. and Mrs. Wilson were seriously injured

Mr. and Mrs. Wilson fear for their safety and the safety of their children as a result of the defendants' conduct. The disclosure of Mrs. Wilson's covert identity makes her and her family a target for those persons and groups who bear hostility to the United States and/or its intelligence officers. (*Id.*, ¶ 42).

As a result of the defendants' actions, Mrs. Wilson was impaired in her ability to carry out her duties at the CIA, and to pursue the career she had planned there, serving her country. (*Id.*, ¶ 43). Her ability to continue as a secret operative obviously was ended. Both Mr. and Mrs. Wilson have suffered gross invasions of privacy as a result of the defendants' conduct. (*Id.*, ¶ 41).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court Should Grant Review To Resolve An Issue Of National Importance That Has Divided The Lower Courts Concerning What Is Sufficient To Constitute "Special Factors Counseling Hesitation" That Preclude Constitutional Claims For Damages Pursuant To *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*

In *Bivens*, this Court held federal officials may be sued for money damages for violating the Constitution unless there are "special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. To this point, this Court has recognized three "special factors counseling hesitation" that preclude *Bivens* actions. First, *Bivens* suits are not allowed where Congress has provided an alternative remedy in a comprehensive statute. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412 (1988) (Social Security Act provides a remedy that precludes *Bivens* actions); *Bush v. Lucas*, 462 U.S. 367 (1983) (Civil Service Reform Act provides a remedy that precludes *Bivens* actions). Second, *Bivens* actions are not allowed for injuries resulting from military service. *See, e.g., Stanley v. United States*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983). Finally, *Bivens* actions are not permitted where, on balance, it is not desirable to allow them. *See, e.g., Wilkie v. Robbins*, 127 S. Ct. 2588 (2007).

This case involves none of these three factors. Nevertheless, both the district court and the court of appeals found the Privacy Act was a special factor that precluded the Wilsons' *Bivens* claims even though, as explained below, this statute does not apply to the defendants or to the claims presented here. The district court and the court of appeals also found the risk of revealing confidential information was another special factor counseling hesitation, even though this risk is totally speculative at the motion to dismiss stage and is not present at all for some of the claims presented.

This case reflects the tremendous confusion in the lower courts concerning what is a "special factor counseling hesitation." There are a significant number of cases focusing on this question and there is great disagreement among them. *See, e.g., Arar v. Ashcroft,* 532 F.3d 157 (2d Cir. 2008), *rehearing en banc granted* (no *Bivens* action for individuals who claim to have been illegally detained and tortured because of the actions of United States officials); *Casteneda v. United States*, 546 F.3d 61 (9th Cir. 2008) (no special factor counseling hesitation precludes suit by survivor of individual who died while in I.N.S. custody); *Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999) (special factors counseling hesitation preclude *Bivens* claims in the immigration context).

Specifically, the two special factors counseling hesitation on which the district court and court of appeals relied raise important issues of federal law and a conflict with other circuits.

A. Can A Statute That Does Not Apply And Can Provide No Remedy Be A Special Factor Counseling Hesitation?

The court of appeals concluded the Privacy Act, 5 U.S.C. § 552a, precludes the plaintiffs' constitutional claims under *Bivens*. There is no dispute, however, that the Privacy Act provides the plaintiffs no cause of action. First, the Privacy Act provides absolutely no cause of action for Mr. Wilson, who sued claiming a violation of his First Amendment rights because of the defendants' retaliation in response to his constitutionally protected speech. In *Sussman v. U.S. Marshals*, 494 F.3d 1106, 1123 (D.C. Cir. 2007), the court held the Privacy Act provides a remedy only for the person whose records have been released; it has no application when the records of some other person are involved. Under *Sussman*, Mr. Wilson has no possible Privacy Act claim for the disclosure of confidential information about his wife.

Second, there is no dispute the Privacy Act does not apply to the offices of the president and vice president and thus cannot preclude causes of action against defendants Cheney, Libby, and Rove. The Privacy Act applies to federal agencies and relies on the definition of "agency" found within the Freedom of Information Act (FOIA), 5 U.S.C. § 552a. This Court has held the "unambiguous" legislative history of FOIA establishes that the Office of the President does not fall within that statute's definition of "agency." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). Following this

reasoning, numerous courts have found the Office of the President is also not covered by the Privacy Act. *See, e.g., Jones v. Executive Office of President*, 167 F. Supp. 2d 10, 18 (D.D.C. 2001); *Dale v. Executive Office of President*, 164 F. Supp. 2d 22, 26 (D.D.C. 2001). Similarly, courts have expressly ruled the Office of the Vice President is not covered by the Privacy Act. *See, e.g., Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 55 (D.D.C. 2002); *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147-48 (D.D.C. 2000).

But every Supreme Court case precluding a *Bivens* action based on the existence of a "comprehensive remedial scheme" involved a comprehensive statute that provided some potential remedy for the plaintiffs. In *Bush v. Lucas*, 462 U.S. 367 (1983), this Court found there were adequate remedies available under the civil service process to preclude a *Bivens* suit by a federal employee arising from an adverse employment action. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), this Court concluded there were sufficient remedies under the Social Security Act to preclude a *Bivens* suit for wrongful termination of disability benefits. And in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), this Court found that outside of the *Bivens* context the plaintiff "had an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." 127 S. Ct. at 2600. This Court also has made clear this alternative remedy must be "equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

Here, though, no alternative remedy exists. The court of appeals concluded the exclusion of the

offices of president and vice president indicates a desire to eliminate civil suits as well. App. at 17a-18a. But the Court failed to consider the legislative history of the Privacy Act in assessing whether it can reasonably be understood as precluding constitutional claims in situations where the Act does not apply. When Judge Rogers, in her dissenting opinion, took that legislative history into account, she concluded:

> In any event, the legislative history demonstrates that the Privacy Act was designed to add protection, not to eliminate existing remedies or those that might be developed by the courts. See, e.g., S. Rep. No. 93-1183, at 2-3, 16, Source Book on Privacy at 155-56, 169; H.R. Rep. No. 93-1416 at 3 (1974), Source Book on Privacy at 296; 120 Cong. Rec. 40,410 (1974) (statement of Sen. Muskie). Most significantly, the Senate Report states that the Privacy Act "should not be construed as a final statement by Congress on the right of privacy and other related rights as they may be developed or interpreted by the courts." S. Rep. No. 93-1183, at 15, Source Book on Privacy at 168 (emphasis added). The legislative history satisfies any "clear expression" requirement, as it makes manifest that Congress did not intend the Privacy Act to be a final or exclusive remedy but contemplated a continuing role for the courts. The court therefore errs in treating Congress's decision to exempt certain Executive offices from the Privacy Act as a "convincing" reason to refrain from implying a Bivens remedy.

Rogers, J., concurring in part and dissenting in part, App. at 40a-41a (citations omitted).

Certiorari is thus necessary because the approach of the court of appeals creates a conflict with the decisions of other courts. Other circuits have ruled where it "seems plain ... that Congress never has given a moment's thought to the question of what sort of remedies should be available," *Krueger v. Lyng*, 927 F.2d 1050, 1057 (8th Cir. 1991), a *Bivens* suit may proceed. As the Seventh Circuit noted: "Where "Congress's failure to provide a remedy for constitutional wrongs suffered by [such a plaintiff] has been inadvertent" the plaintiff "may proceed with his Bivens action." *Bagola v. Kindt*, 131 F.3d 632, 642 (7th Cir.1997). Under these approaches, the Wilsons' suit would not have been precluded in other circuits.

Moreover, the approach taken by the court of appeals -- precluding a *Bivens* remedy based on a statute that provides the plaintiffs *no* remedy -- raises serious constitutional issues not acknowledged or discussed in the court of appeals' opinion. Whether Congress can preclude a remedy for constitutional violations where no other remedy exists is extremely problematic under the Constitution. *See, e.g., Oestereich v. Selective Serv. Sys. Local Bd. No. 1*, 393 U.S. 233, 243-44 n.6 (1968) (it "is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims.").

This Court should grant review to clarify when the existence of a statute, especially one that is inapplicable and provides no remedy, can be a special factor counseling hesitation barring a *Bivens* suit.

B. Can Speculation About Possible Disclosure Of Confidential Information Warrant Granting A Motion To Dismiss?

The other ground given by the court of appeals for finding a special factor counseling hesitation is the potential disclosure of secret information. App. at 21a-22a ("Litigation of the Wilsons' allegations would inevitably require an inquiry into classified information that may undermine ongoing covert operations.")

At the motion to dismiss stage, however, it is purely speculative whether this case would risk disclosure of secret or sensitive information. Because of the procedural posture of the case no discovery requests have been made. Nor has the district court seen how plaintiffs will try to prove their claims, at least some of which do not implicate secret information at all. For example, whether Mr. Wilson's First Amendment rights were violated in retaliation for his exposing falsehoods has no relation to any secret information. All of the information needed to litigate this claim already has been widely reported and is a matter of public record: Mr. Wilson engaged in speech protected by the First Amendment and the defendants retaliated by revealing his wife was a secret operative for the

CIA. Indeed, the attorney for the United States conceded this point in open court during oral argument in the district court and it became a matter of public record in the criminal prosecution of Mr. Libby. It is hard to imagine what classified information would be necessary to litigate Mr. Wilson's First Amendment claim. Nor is it apparent plaintiffs' due process or constitutional privacy claims would require disclosure of confidential information.

If this problem were to manifest itself later, the district court could deal with it in an appropriate manner by allowing the suit to go forward without use of secret information or, as a last resort, by dismissing particular claims. There is no basis at this juncture, however, for dismissing the entire lawsuit based on speculation that litigation of some claims may risk the exposure of secret information. This risk does not constitute a special factor counseling hesitation that precludes the Wilsons' *Bivens* claims.

CONCLUSION

Although this case arises in a unique and compelling context, the underlying question presented is one of enormous significance and warrants certiorari: Can plaintiffs be precluded from suing for constitutional violations when they are left with no remedies at all? This Court should grant certiorari to clarify what constitutes "special factors counseling hesitation" under *Bivens*.

Respectfully submitted,

/s/

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APPENDIX

Entered August 12, 2008

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 9, 2008 Decided August 12, 2008

No. 07-5257

VALERIE PLAME WILSON AND
JOSEPH C. WILSON, IV,
APPELLANTS

v.

I. LEWIS LIBBY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 06cv01258)

Erwin Chemerinsky argued the cause for appellants. With him on the briefs were *Anne L. Weismann* and *Melanie T. Sloan*.

Jeffrey S. Bucholtz, Acting Assistant Attorney General, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Jeffrey A. Taylor*, U.S. Attorney, *Mark B. Stern* and *Charles W. Scarborough*, Attorneys, *Michael L. Waldman*, *John G. Kester*, *Terrence O'Donnell*,

Robert D. Luskin, *William H. Jeffress Jr.*, and *Alex J. Bourelly*. *Richard Montague*, Attorney, U.S. Department of Justice, *R. Craig Lawrence*, Assistant U.S. Attorney, and *Jeffrey A. Lamken*, entered appearances.

John G. Kester and *Terrence O'Donnell* were on the brief for appellee Vice President Richard B. Cheney.

Before: SENTELLE, *Chief Judge*, HENDERSON and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* ROGERS.

SENTELLE, *Chief Judge*: In his 2003 State of the Union address, President George W. Bush reported that "[t]he British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."[1] Those sixteen words set off a series of events which resulted in the disclosure of Valerie Plame Wilson's previously covert status at the Central Intelligence Agency. Valerie Plame Wilson and her husband, Joseph C. Wilson IV, have filed this action for damages to remedy the injuries they allege they suffered because of that disclosure. Defendants are the

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[1] George W. Bush, U.S. President, State of the Union Address Before the Nation (Jan. 23, 2003) (transcript available at http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html).

United States and four Executive Branch officials -- Vice President Richard B. Cheney, former Senior Advisor to the President Karl C. Rove, former Assistant to the President and Chief of Staff to the Vice President I. Lewis "Scooter" Libby, Jr., and former Deputy Secretary of State Richard L. Armitage. On motions to dismiss, the district court dismissed all claims. We affirm.

I. BACKGROUND

We accept the factual allegations in the Amended Complaint as true for purposes of this appeal. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). During the spring of 2003, after President George W. Bush informed the Nation that "[t]he British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa," there was much speculation in the press about whether the uranium allegation was credible and whether individuals at the White House were aware of questions about its credibility when the State of the Union address was given. On May 6, 2003, *The New York Times* published the first article questioning the veracity of the claim. That article by Nicholas Kristof cited as its source a "former ambassador" who had traveled to Niger in early 2002 and reported back to the Central Intelligence Agency ("CIA") and the State Department that the uranium "allegations were unequivocally wrong and based on forged documents." Am. Compl. ¶ 19b.

The Vice President's Chief of Staff, I. Lewis "Scooter" Libby, Jr., contacted the State Department and asked for information about the Niger trip reported in *The New York Times*. The State Department's Bureau of Intelligence and Research was directed to prepare a report about the travel and an Under Secretary kept Libby updated about its progress. The Under Secretary informed Libby that the former ambassador was Joseph Wilson. In June 2003, Libby was further advised by the Under Secretary and by a senior official at the CIA that Valerie Plame Wilson was Joseph Wilson's wife, that she worked at the CIA, and that some thought that she helped plan Joseph Wilson's trip to Niger. Vice President Cheney also told Libby that Valerie Plame Wilson worked at the CIA in the Counterproliferation Division.

On June 12, 2003, *The Washington Post* published an article critical of the uranium claim based on the report of a retired ambassador who had traveled to Niger. Another article was published on June 19, 2003, in *The New Republic*. Entitled "The First Casualty: The Selling of the Iraq War," the article alleged that the Vice President's office had prompted the former ambassador's trip to Niger and that, after the trip, administration officials "'knew the Niger story was a flat-out lie.'" Am. Compl. ¶ 19k (quoting Spencer Ackerman & John B. Judis, The First Casualty: The Selling of the Iraq War, NEW REPUBLIC, June 30, 2003, at 14). Several news outlets carried the story on July 6, 2003. *The New York Times* published an Op-Ed by Joseph Wilson entitled "What I Didn't Find in Africa;" *The Washington Post* published an article based on an

interview with Joseph Wilson; and the *Meet the Press* television show included Joseph Wilson as a guest. Wilson confirmed the prior reports of his travel to Niger in 2002 and his doubts about the uranium claims and said that he had told the administration of his doubts upon his return from Niger.

The administration commenced an effort to rebut the Wilson allegations. In July, Libby talked to Judith Miller of *The New York Times* and to Matthew Cooper of *Time* magazine; Karl Rove talked to Matthew Cooper of *Time* magazine and to Chris Matthews, host of MSNBC's "Hardball;" and Deputy Secretary of State Richard Armitage met with reporter Robert Novak. Armitage, who had learned of Valerie Wilson's CIA employment from a State Department memo, told Novak that Valerie Wilson worked at the CIA on issues relating to weapons of mass destruction. Novak then wrote an article that was published in several newspapers, including *The Washington Post* and the *Chicago Sun Times*, on July 14, 2003. In the article, he wrote that "Wilson never worked for the CIA, but his wife, Valerie Plame, is an Agency operative on weapons of mass destruction." Am. Compl. ¶ 14. That article, Valerie Wilson contends, "destroyed her cover as a classified CIA employee." *Id.*

The Wilsons filed a complaint in district court seeking money damages from Vice President Cheney, Libby, and Rove for injuries allegedly suffered because of the disclosure of Valerie Wilson's employment at the CIA. They amended their complaint on September 13, 2006, to add Armitage

as a defendant. The Wilsons seek damages for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and for the invasion of their privacy under District of Columbia tort law.

The district court dismissed all of their claims. *Wilson v. Libby*, 498 F. Supp. 2d 74 (D.D.C. 2007). The court held that the Wilsons failed to state a *Bivens* claim upon which relief could be granted because special factors counsel against creating a *Bivens* remedy in this case. The Wilsons' *Bivens* claims were based on alleged violations of their Fifth Amendment rights to equal protection of the laws, of Joseph Wilson's First Amendment right to freedom of speech, and of Valerie Wilson's Fifth Amendment rights to privacy and property, with each claim based on the disclosure of personal information covered by the Privacy Act, 5 U.S.C. § 552a. Because this Court has held that the Privacy Act is a comprehensive remedial scheme, *Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 274 (D.C. Cir. 2003), *aff'g in relevant part* No. 00-1912 (D.D.C. Sept. 20, 2001), and because the Supreme Court has held that the existence of a comprehensive remedial scheme precludes implication of *Bivens* remedies even where the scheme does not provide full relief, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2600-01, 2604-05 (2007); *Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988); *Bush v. Lucas*, 462 U.S. 367, 388 (1983), the district court concluded that it could not imply a *Bivens* remedy here. The court further concluded that creating a *Bivens* remedy in this case would be inappropriate because, if litigated, the case would

inevitably require the disclosure of sensitive intelligence information.

The district court held that the invasion of privacy claim also required dismissal. The United States had intervened in the lawsuit with respect to the tort claim and had filed a certification pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(2), that, "at the time of the conduct alleged in the amended complaint the individual federal defendants . . . were each acting within the scope of their employment as employees of the United States." The court found that the Westfall Act certification was proper, meaning that the case must proceed solely against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671–80. Because the Wilsons had not exhausted administrative remedies as required by the FTCA, the court dismissed the claim for lack of jurisdiction. The Wilsons appealed.

II. JURISDICTION

The "first and fundamental question" that we are "bound to ask and answer" is whether we have jurisdiction to decide this appeal. *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)) (internal quotation marks omitted). "'The requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."'" *Id.* (quoting *Steel Co.*, 523 U.S. at 94–95 (quoting *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884))). Therefore, we must "'address questions

pertaining to [our] jurisdiction before proceeding to the merits.'" *Id.* (quoting *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005)).

The Vice President argues that we do not have jurisdiction under the political question doctrine because this case involves the identity of a covert agent and thereby implicates foreign-policy and national-security decisions that are reserved to the Executive Branch. We conclude that the allegations do not implicate the political question doctrine.

The political question doctrine "'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" *Bancoult*, 445 F.3d at 432 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). The doctrine applies where, "[p]rominent on the surface" of the case is:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality

> of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). "'[U]nless one of these formulations is inextricable from the case at bar,' we may not dismiss the claims as nonjusticiable under the political question doctrine." *Bancoult*, 445 F.3d at 432–33 (quoting *Baker*, 369 U.S. at 217).

The doctrine does not apply here. While "decision-making in the fields of foreign policy and national security is textually committed to the political branches of government," *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), the Wilsons have not challenged any foreign policy or national security decisions entrusted to the Executive Branch. They have instead challenged disclosures made by high-level executive branch officials when speaking with the press. The disclosures may have implicated national security by identifying a previously covert agent, but the lawsuit itself is not about national security in a manner requiring application of the political question doctrine. We therefore will proceed to the merits of the Wilsons' claims.

III. Analysis

The Wilsons argue that the district court erred in holding that special factors preclude implication of a *Bivens* claim and that the Government's Westfall Act certification was proper. On each legal issue, our

review is *de novo*. *See Rasul v. Myers*, 512 F.3d 644, 654 (D.C. Cir. 2008).

A. *Constitutional Claims*

The Wilsons first contest the district court's ruling that *Bivens* remedies are not available for their injuries. We agree with the district court that we cannot create a *Bivens* remedy because the comprehensive Privacy Act and the sensitive intelligence information concerns affiliated with this case preclude us from doing so.

1.

We have discretion in some circumstances to create a remedy against federal officials for constitutional violations, but we must decline to exercise that discretion where "special factors counsel[] hesitation" in doing so. *See Bivens*, 403 U.S. at 396; *Spagnola v. Mathis*, 859 F.2d 223, 226 (D.C. Cir. 1988) (en banc). In *Bivens*, the Court implied a remedy where there were no "'special factors counselling hesitation in the absence of affirmative action by Congress'" that required "the judiciary [to] decline to exercise its discretion in favor of creating damages remedies against federal officials." *Spagnola*, 859 F.2d at 226 (quoting *Bivens*, 403 U.S. at 396). Since *Bivens*, the Supreme Court has "recognized two more nonstatutory damages remedies, the first for employment discrimination in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979), and the second for an Eighth Amendment violation by prison officials, *Carlson v. Green*, 446 U.S. 14 (1980)," but "in most

instances[, the Court has] found a *Bivens* remedy unjustified." *Wilke v. Robbins*, 127 S. Ct. 2588, 2597 (2007). Indeed, in its "more recent decisions[, the Supreme Court has] responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Chilicky*, 487 U.S. at 421.

One "special factor" that precludes creation of a *Bivens* remedy is the existence of a comprehensive remedial scheme. In *Bush v. Lucas*, 462 U.S. 367 (1983), the Court held that the federal civil service laws were a "special factor" that precluded additional *Bivens* remedies because they constituted "an elaborate remedial system that ha[d] been constructed step by step, with careful attention to conflicting policy considerations" and thereby reflected Congressional judgment about the type and magnitude of relief available. *Id.* at 388–90. The scheme did not provide "complete relief" to the plaintiff, but the Court held that the special factors inquiry does "not concern the merits of the particular remedy that was sought" or its completeness. *Id.* at 380, 388. Rather, the doctrine "relate[s] to the question of who should decide whether such a remedy should be provided." *Id.* at 380. "[C]onvinced that Congress is in a better position to decide whether or not the public interest would be served" by the addition of legal liability, the Court refused to create new remedies under *Bivens* for the plaintiff in *Bush*. *Id.* at 390.

The Supreme Court reiterated that a remedial statute need not provide full relief to the plaintiff to qualify as a "special factor" in *Schweiker v. Chilicky*, 487 U.S. 412 (1988). In *Chilicky*, "exactly as in *Bush*,

Congress ha[d] failed to provide for 'complete relief': respondents ha[d] not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits." *Chilicky*, 487 U.S. at 425. But, the Court noted, "[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Id.* at 421–22. Rather, "the concept of 'special factors counselling hesitation in the absence of affirmative action by Congress' . . . include[s] an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Id.* at 423. Therefore, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," courts should not "create[] additional *Bivens* remedies." *Id.* Because "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program," the Court refused to question the legislative decision to exclude certain remedies from that program. *Id.* at 429.

Most recently, in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), the Court again held that the creation of a *Bivens* remedy is not required solely because there is no alternative statutory remedy. In *Wilkie*, there was no comprehensive scheme demonstrating "that Congress expected the Judiciary to stay its *Bivens* hand," but the Court declined to imply a *Bivens* remedy nonetheless. *Id.* at 2600. The Court

held that a remedy for allegedly harassing conduct of government officials would "come better, if at all, through legislation [because] 'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf." *Id.* at 2604–05 (quoting *Bush*, 462 U.S. at 389). The Court's "point . . . is not to deny that Government employees sometimes overreach, for of course they do, and they may have done so here if all the allegations are true." *Id.* at 2604. Instead, "[t]he point is the reasonable fear that a general *Bivens* cure would be worse than the disease." *Id.* The Court concluded that authority to create a remedy should remain with Congress because Congress can "tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Id.* at 2605. Thus, the Court again made clear that there is no "automatic entitlement" to a *Bivens* remedy regardless of "what other means there may be to vindicate a protected interest." *Id.* at 2597.

Consistent with *Bush*, *Chilicky*, and *Wilkie*, our Court sitting en banc has held that the availability of *Bivens* remedies does not turn on the completeness of the available statutory relief. In *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988), we interpreted *Bush* and *Chilicky* as "ma[king] clear that it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." *Id.* at 227. We held that "courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive

system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies." *Id.* at 228. Quoting *Chilicky*, we explained that, "[i]n these circumstances, it is not for the judiciary to question whether Congress' 'response [was] the best response, [for] Congress is the body charged with making the inevitable compromises required in the design of a massive and complex . . . program.'" *Id.* (quoting *Chilicky*, 487 U.S. at 429).

Our *Spagnola* decision involved the comprehensive scheme established by the Civil Service Reform Act. 859 F.2d at 230. We have also found comprehensive remedial schemes in Title VII of the Civil Rights Act of 1964, *see Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405, 1414–16 (D.C. Cir. 1985), the Freedom of Information Act, *see Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 777 (D.C. Cir. 2002), the Veterans' Judicial Review Act, *see Thomas v. Principi*, 394 F.3d 970, 975–76 (D.C. Cir. 2005), and the Privacy Act, *see Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 274 (D.C. Cir. 2003), *aff'g in relevant part* No. 00-1912 (D.D.C. Sept. 20, 2001).

2.

The Wilsons concede that this Court has held that the Privacy Act, 5 U.S.C. § 552a, is a "special factor" that counsels hesitation in implying *Bivens* remedies. Appellants' Br. At 17–18 (citing *Chung*, 333 F.3d at 274); *accord Doumit v. City of Middleburg Heights*, 301 F.3d 688, 698 (6th Cir.

2002) (finding Privacy Act is a "comprehensive legislative scheme" that precludes additional *Bivens* remedies). But they contend that the Privacy Act should not be found "comprehensive" and preclusive of *Bivens* remedies here because three defendants in this case are exempted from its terms. The failure of the Privacy Act to provide complete relief to the Wilsons, however, does not undermine its status as a "comprehensive scheme" that stops us from providing additional remedies under *Bivens*.

The Privacy Act regulates the "'collection, maintenance, use, and dissemination of information'" about individuals by federal agencies. *Doe v. Chao*, 540 U.S. 614, 618 (2004) (quoting Privacy Act of 1974 § 2(a)(5), 88 Stat. 1896). It "authorizes civil suits by individuals . . . whose Privacy Act rights are infringed," *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1123 (D.C. Cir. 2007), and provides for criminal penalties against federal officials who willfully disclose a record in violation of the Act, 5 U.S.C. § 552a(i)(1).

The claims asserted by the Wilsons are all claims alleging harm from the improper disclosure of information subject to the Privacy Act's protections. The Privacy Act applies to information that is "about an individual," that is stored in a system of records "under the control of any agency," and that is "retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(4), (5). The amended complaint premises the Wilsons' damages on the publication of Valerie Plame Wilson's CIA employment in the Novak

column. Am. Compl. ¶ 40. The publication was the result of a disclosure by Deputy Secretary of State Armitage of information about an individual contained in State Department records. *Id.* at ¶ 14.

Each claim in the Wilson complaint is based on this disclosure of Privacy Act protected information. In Count One, the Wilsons allege that Joseph Wilson's First Amendment right to free speech was violated when the information was disclosed in retaliation for his speech. Count Two alleges that Valerie and Joseph Wilson's Fifth Amendment rights to equal protection of the laws were violated by the disclosure of information because that disclosure treated them differently from others. Count Three alleges that Valerie Wilson's Fifth Amendment right to privacy was violated when her personal information was publicly disclosed. Count Four alleges that Valerie Wilson's Fifth Amendment right to property was violated when the information was disclosed because the disclosure eliminated the secrecy of her position which was essential to her employment. Thus, each Constitutional claim, whether pled in terms of privacy, property, due process, or the First Amendment, is a claim alleging damages from the improper disclosure of information covered by the Privacy Act.

It is true that the Wilsons cannot obtain complete relief under the Privacy Act because the Act exempts the Offices of the President and Vice President from its coverage. *See* 5 U.S.C. § 552a(b) (applying Privacy Act requirements to agencies); *id.* § 552a(a)(1) (adopting definition of "agency" from the

Freedom of Information Act (FOIA)); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (Office of the President is not an "agency" under FOIA); *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F. Supp. 2d 20, 55 (D.D.C. 2002). Thus, even if the Wilsons can prove their allegations against Vice President Cheney, Rove, and Libby, they will not be remunerated for them. Nonetheless, our precedent is plain that the Wilsons are still not entitled to *Bivens* relief as to Vice President Cheney, Rove, or Libby, provided their omission from the remedial scheme was not inadvertent. *See Spagnola*, 859 F.2d at 228.

Congress did not inadvertently omit the Offices of the President and Vice President from the Privacy Act's disclosure requirements. The Privacy Act explicitly defines "agency" by reference to FOIA, 5 U.S.C. § 552a(a)(1), which the Supreme Court has held, based on "unambiguous" legislative history, does not extend to the Office of the President, *Kissinger*, 445 U.S. at 156 (citing H.R. Rep. No. 93-1380 at 15 (1974)); *see also Judicial Watch*, 219 F. Supp. 2d at 55 (concluding that the Vice President and his staff are not "agencies" for purposes of the FOIA). "There is every indication from the legislative history that the drafters of the Privacy Act, in choosing to apply the FOIA definition of 'agency' to the Privacy Act, were cognizant of the Conference Committee Report prepared in connection with the 1974 FOIA Amendments, which specifically provided that 'the term [agency] is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.'" *Jones v.*

Executive Office of the President, 167 F. Supp. 2d 10, 19 (D.D.C. 2001) (quoting H.R. Rep. No. 93-1380, at 15). This intentional omission of thePresidential and Vice Presidential offices from the comprehensive coverage of the Privacy Act requires us to deny the additional remedies to the Wilsons which they seek.

3.

The Wilsons make two principal arguments in attempting to distinguish their case from precedent. First, they rely on the Supreme Court's decision in *Carlson*. In *Carlson* the Supreme Court stated that the right of victims of a constitutional violation to a *Bivens* remedy "may be defeated . . . in two situations." The Court defined the first as "when defendants demonstrate 'special factors counseling hesitation in the absence of affirmative action by Congress.'" 446 U.S. at 18. The Supreme Court described the second as "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18-19. The Wilsons argue that the *Bivens* claim cannot be defeated here because there is no "equally effective alternative remedy." Were we to look at *Carlson* standing alone, this argument might carry much weight. However, subsequent to *Carlson*, the Court clarified that there does not need to be an equally effective alternate remedy. Instead, "the decision whether to recognize a *Bivens* remedy may require two steps." *Wilkie*, 127 S. Ct. at 2598. First, if there is an "alternative, existing process for protecting the interest," then that is "a convincing reason for the Judicial Branch

to refrain from providing a new and freestanding remedy in damages." *Id.* Even if there is no equally effective alternative remedy, the decision of whether to create "a *Bivens* remedy is a subject of judgment" that requires the court to "'make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" *Id.* (quoting *Bush*, 462 U.S. at 378). In other words, an equally effective statutory remedy is a sufficient, but not essential, reason for us to abstain from creating *Bivens* remedies. The presence of a comprehensive remedial scheme is also a sufficient reason for us to stay our hand.

Second, the Wilsons argue that other remedies have been available to the plaintiffs in cases where the Court denied a *Bivens* remedy. In *Bush*, the Court referred to the "comprehensive nature of the remedies currently available" under the civil service laws, 462 U.S. at 388; in *Chilicky*, the Court described the Social Security Act as a "comprehensive statutory scheme," 487 U.S. at 428; and in *Wilkie*, the Court noted that the plaintiff could avail himself of a "patchwork" of remedies for some of his injuries, 127 S. Ct. at 2600. Here, in contrast, the Wilsons assert that they will never be able to obtain any remuneration for injuries allegedly suffered because of the actions of Vice President Cheney, Rove, and Libby if they cannot proceed under *Bivens*. Thus, they argue, they are like the plaintiffs in *Davis* and *Bivens* who were given a *Bivens* remedy because they had no other avenue of relief available to them. *See Davis*, 442

U.S. at 245 ("There are available no other alternative forms of judicial relief."); *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment) ("For people in Bivens' shoes, it is damages or nothing.").

The first problem with this argument is that the Wilsons, unlike the plaintiffs in *Davis* and *Bivens*, can seek at least some remedy under the Privacy Act. At the least, as they concede, Valerie Wilson has a possible claim based on the disclosure by Deputy Secretary of State Armitage because the information disclosed about her and the agency involved in the disclosure are subject to the Privacy Act's restrictions. Appellants' Br. at 18 n.3. So, while the Privacy Act may not provide the Wilsons with full relief regarding the alleged disclosures, and provides Mr. Wilson with no relief, the Wilsons cannot contend that there is no possibility of relief at all under the statute for their disclosure of Privacy Act protected information.

The more significant flaw in the Wilsons' argument is its focus on the necessity of a remedy at all. The special factors analysis does not turn on whether the statute provides a remedy to the particular plaintiff for the particular claim he or she wishes to pursue. In *Spagnola*, we held that a comprehensive statutory scheme precludes a *Bivens* remedy even when the scheme provides the plaintiff with "no remedy whatsoever." 859 F.2d at 228 (quoting *Chilicky*, 487 U.S. at 423). And the Supreme Court, in its most recent consideration of the issue, did not create a remedy even though there was no cause of action that the plaintiff could pursue

to remedy injuries that resulted from a prolonged "course of dealing as a whole." *Wilkie*, 127 S. Ct. at 2600-01, 2604-05. The pertinent inquiry is "the question of who should decide whether such a remedy should be provided," *Bush*, 462 U.S. at 380, not whether there is a remedy. Indeed, it is where Congress has intentionally withheld a remedy that we must most refrain from providing one because it is in those situations that "appropriate judicial deference" is especially due to the considered judgment of Congress that certain remedies are not warranted. *See Chilicky*, 487 U.S. at 423. That deference must be given whether Congress has chosen to exclude a remedy for particular claims, as in *Bush* and *Chilicky*, or from particular defendants, as here. Provided "Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies," *Spagnola*, 859 F.2d at 228, we cannot create additional remedies.

Therefore, because Congress created a comprehensive Privacy Act scheme that did not inadvertently exclude a remedy for the claims brought against these defendants, we will not supplement the scheme with *Bivens* remedies.

4.

We also cannot ignore that, if we were to create a *Bivens* remedy, the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of

national security and sensitive intelligence information. The decision of whether to create a *Bivens* remedy involves our judgment and "weighing [of] reasons for and against the creation of a new cause of action, the way common law judges have always done." *Wilkie*, 127 S. Ct. at 2600. Pertinent to that judgment are the difficulties associated with subjecting allegations involving CIA operations and covert operatives to judicial and public scrutiny.

There is no dispute on appeal that a *Bivens* remedy in this case is not precluded by the Intelligence Identities Protection Act of 1982 ("IIPA"), 50 U.S.C. §§ 421–26, or by the justiciability doctrine of *Totten v. United States*, 92 U.S. 105 (1875). The IIPA is not a "comprehensive remedial scheme" for purposes of the special factors analysis because it is a purely criminal statute that only authorizes criminal prosecution of those who intentionally disclose the identity of a covert agent. *See* 50 U.S.C. § 421. And the doctrine of *Totten*, which precludes suits "against the Government based on covert espionage agreements," *Tenet v. Doe*, 544 U.S. 1, 3 (2005), does not apply where the suit is "brought by an acknowledged (though covert) employee of the CIA," *id.* at 10. Nonetheless, the concerns that underlie the protective restrictions of the IIPA and the *Totten* doctrine are valid considerations in the *Bivens* analysis and weigh against creating a remedy in this case. As the Supreme Court has recognized, "'[e]ven a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to "close up like a clam."'" *Id.* at 11 (quoting *CIA v. Sims*, 471 U.S. 159,

175 (1985)). We will not create a cause of action that provides that opportunity.

Litigation of the Wilsons' allegations would inevitably require an inquiry into "classified information that may undermine ongoing covert operations." *See Tenet*, 544 U.S. at 11. The amended complaint alleges that the disclosure of Valerie Plame Wilson's identity "impaired . . . her ability to carry out her duties at the CIA," Am. Compl. ¶ 43, increased the risk of violence to her and her family, *id.* at ¶ 42, and subjected her to treatment different from that given other similarly situated agents, *id.* at ¶¶ 51–52. We certainly must hesitate before we allow a judicial inquiry into these allegations that implicate the job risks and responsibilities of covert CIA agents. In cases involving covert espionage agreements, "[t]he state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection [the Court] found necessary in enunciating the *Totten* rule." *Tenet*, 544 U.S. at 11. Here, although *Totten* does not bar the suit, the concerns justifying the *Totten* doctrine provide further support for our decision that a *Bivens* cause of action is not warranted.

For all the above-stated reasons, we will not imply a *Bivens* remedy. The district court's decision in this regard is affirmed.

B. *Tort Claim*

The Wilsons also contest the district court's dismissal of their tort claim. With respect to the tort

claim, the United States made a certification pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), 28 U.S.C. § 2679, that "at the time of the conduct alleged in the amended complaint the individual defendants . . . were acting within the scope of their employment as employees of the United States." The certification carries a rebuttable presumption that the employee has absolute immunity from the lawsuit and that the United States is to be substituted as the defendant. *Id.* § 2679(d); *Osborn v. Haley*, 127 S. Ct. 881, 887–88 (2007); *Council on Am. Islamic Relations (CAIR) v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006). If the presumption is not rebutted in this case, the case must be dismissed because the Wilsons have not exhausted their administrative remedies as required to pursue a claim against the United States pursuant to the Federal Tort Claims Act. *See* 28 U.S.C. § 2675(a).

The Wilsons seek to rebut the certification's claim that the defendants were working within their scope of employment when the disclosures were made. To determine whether an employee was acting within the scope of employment under the Westfall Act, we apply the respondeat superior law in the state in which the alleged tort occurred. *CAIR*, 444 F.3d at 663. District of Columbia law, which applies in this case, defines the cope of employment in accordance with the Restatement Second) of Agency (1958) ("Restatement"). *Id.* (citing *Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346, 348 n.4 D.C. 1987). The Restatement provides, in pertinent part, that:

> Conduct of a servant is within the scope of mployment if, but only if:
>
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement § 228(1); *see CAIR*, 444 F.3d at 663. "'[T]he test for scope of employment is an objective one, based on all the facts and circumstances.'" *Id.* (quoting *Weinberg v. Johnson*, 518 A.2d 985, 991 (D.C. 1986)). "Although scope of employment is generally a question for the jury, it 'becomes a question of law for the court, however, if there is not sufficient evidence from which a reasonable juror could conclude that the action was within the scope of the employment.'" *Id.* (quoting *Boykin v. District of Columbia*, 484 A.2d 560, 562 (D.C. 1984)).

The Wilsons argue that the disclosure of a covert agent's identity cannot fall within an employee's scope of employment with the United States because the disclosure is unlawful and threatens the security of the nation, its covert agents, and its intelligence-gathering functions. But, as we explained in *CAIR*, "[t]his argument rests on a misunderstanding of D.C. scope-of-employment law (not to mention the plain text of the Westfall Act), which directs courts to look beyond alleged

intentional torts themselves" to the underlying conduct in determining whether that conduct was within the scope of employment. 444 F.3d at 664. As a result, an employee's scope of employment "'is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf.'" *Id.* (quoting *Weinberg*, 518 A.2d at 992). We noted in *CAIR* that D.C. courts have concluded that "a reasonable juror could find that a laundromat employee acted within scope of employment when he shot a customer during a dispute over missing shirts," *id.* (citing *Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981)), and that a "jury reasonably found that a mattress deliveryman acted within [the] scope of employment when he assaulted and raped a customer following a delivery-related dispute," *id.* (citing *Lyon v. Carey*, 533 F.2d 649, 652 (D.C. Cir. 1976)).

We have since held, under D.C. scope of employment law, that the alleged "authorization, implementation and supervision of torture" was within the scope of employment of military officers who interrogated detainees at the United States Naval Base at Guantanamo Bay, Cuba. *Rasul v. Myers*, 512 F.3d 644, 656 60 (D.C. Cir. 2008). In *Rasul*, the allegation that employees had engaged in "serious criminality" while interrogating detainees did not change the result because "the detention and interrogation of suspected enemy combatants [was] a central part of the [employees'] duties as military officers charged with winning the war on terror." *Id.* at 658 60. Because "the detention and interrogation of suspected enemy combatants [was] the type of conduct the defendants were employed to engage in,"

id. at 658, the "alleged tortious conduct was incidental to the defendants' legitimate employment duties," *id.* at 659, and "allegations of serious criminality d[id] not alter our conclusion that the defendants' conduct was incidental to authorized conduct," *id.* at 660.

Even more to the point for purposes of this case, we held in *CAIR* that a congressman's allegedly defamatory statement made during a press interview was within the scope of his employment because "[s]peaking to the press during regular work hours in response to a reporter's inquiry falls within the scope of a congressman's 'authorized duties.'" *Id.* A congressman's "ability to do his job as a legislator effectively is tied, as in this case, to the Member's relationship with the public and in particular his constituents and colleagues in the Congress." *Id.* at 665. Thus, we held that the congressman's statement to the press was "of the kind he is employed to perform" and "actuated, at least in part, by a purpose to serve the master." *Id.* at 664–66 (quoting Restatement § 228(1)).

Here, the Wilsons allege that the defendants spoke to the press in order to diffuse Joseph Wilson's criticism of the Executive's handling of pre-war intelligence. Am. Compl. ¶¶ 2–3. It can hardly be disputed that such discussions were of the type that the defendants were employed to perform. Even the Wilsons agree that "[o]f course, the defendants may discredit public critics of the Executive Branch." Appellants' Br. at 33. The conduct, then, was in the defendants' scope of employment regardless of whether it was unlawful or contrary to the national

security of the United States. Therefore, we agree with the district court that the Wilsons' arguments about the illegality and impropriety of the alleged conduct are misplaced. The government's scope-of-employment certification is proper, and the district court's dismissal of the tort claim is affirmed.[2]

IV. CONCLUSION

Because the Wilsons have failed to state constitutional *Bivens* claims for which relief may be granted and have failed to exhaust their administrative remedies as required to pursue a tort claim against the United States, we affirm the judgment of the district court dismissing the Wilsons' amended complaint in its entirety.[3]

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[2] We further agree with the district court that further discovery is not warranted to determine precise times and locations of the defendants' conversations with the press. Even if some conversations took place on Sunday or occurred off White House property as the Wilsons contend and seek to discover, the conversations would still have occurred within the "time and space" of employment of the high-level Executive Branch employees sued here. Neither the Vice President, his chief of staff, nor a close advisor to the President punches out of work at the end of the day or when he leaves White House property.

[3] Because our decision, based on the grounds considered by the district court, results in the dismissal of all claims against the Vice President of the United States, we need not, and do not, consider his alternate claim for absolute Vice-Presidential immunity.

ROGERS, *Circuit Judge*, concurring in part and dissenting in part: In holding that the Privacy Act is a comprehensive remedial scheme that precludes creation of a *Bivens* remedy for any of the Wilsons' constitutional claims, Op. at 18, the court assigns to the Privacy Act a burden that it was never intended to bear. Aimed at protecting "one of our most fundamental civil liberties — the right to privacy,"[1] the Privacy Act established certain enforceable rights, such as the right to have access to and notice of one's agency records, to limit the government's collection of certain information, and to consent to its release. 5 U.S.C. §§ 552a(b)-(f). The Act balanced these individual protections against the government's legitimate need for information and information systems,[2] but did not eliminate other protections under the Constitution. The issue presented is thus not whether any individual may obtain some relief regarding information that is protected under the Act, but whether the Wilsons are to be afforded an opportunity to obtain relief for alleged constitutional violations against which the Act provides no protection. Nothing in Congress's decision to limit remedies under the Act to individuals with agency records or to exempt the offices of the President and Vice President shows an intention to deny a cause of action for violations of the First and Fifth Amendments to the Constitution, as the legislative history makes clear, *see, e.g.*, S.

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[1] 120 CONG. REC. 12,646 (1974) (statement of Sen. Ervin).

[2] H.R. REP. NO. 93-1416, at 4 (1974), *reprinted in* JOINT COMM. ON GOV'T OPERATIONS, 94TH CONG., LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974: SOURCE BOOK ON PRIVACY at 297 (1976).

REP. NO. 93-1183, at 15 (1974), *reprinted in* JOINT COMM. ON GOV'T OPERATIONS, 94TH CONG., LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974: SOURCE BOOK ON PRIVACY at 3 (1976). Furthermore, the court's invocation of other special factors is based on unfounded and premature speculation about a risk of disclosure of secret or sensitive information, Op. at 19. The Wilsons' claims, as alleged, do not rely on such information but on information already in the public domain, *see, e.g., United States v. Libby*, 498 F. Supp. 2d 1 (D.D.C. 2007). The United States has not invoked the state secrets privilege. Besides, district courts are well-situated to protect against unwarranted disclosures, and any concern here about the disclosure of sensitive information in lawsuits against the President's close advisors can be resolved by evidentiary rules and the defense of immunity, which the district court has yet to address.

I.

A brief overview of *Bivens* precedent reveals how far this court strays. For a plaintiff alleging the violation of a constitutional right by a federal government official, the analysis of whether a court should imply a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), involves two primary steps after a determination that a "constitutionally recognized interest" is at stake, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2598 (2007). First, the court must determine "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from

providing a new and freestanding remedy in damages." *Id.* When it is "hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim," *id.* at 2600 (citing *Schweiker v. Chilicky*, 487 U.S. 412, 426 (1988); *Bush v. Lucas*, 462 U.S. 367, 388 (1983); *Bivens*, 403 U.S. at 397), step two of the analysis directs the court to "make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation," *id.* at 2598 (citation and internal quotation marks omitted).

Under step one, the Supreme Court has rejected the notion that state tort law of privacy could adequately protect a victim's "absolute right" under the Fourth Amendment, *Bivens*, 403 U.S. at 392, observing that tort law may be inconsistent or hostile to Fourth Amendment guarantees, *id.* at 394, such that it was appropriate to imply a constitutional damages remedy against individual law enforcement officers as "the ordinary remedy for an invasion of personal interests in liberty," *id.* at 395. Similarly, in *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court rejected the notion that a damages remedy against the United States pursuant to the Federal Tort Claims Act could sufficiently protect a prisoner's Eighth Amendment rights as would preclude a damages action against individual prison officials, *id.* at 23. In each instance, the Supreme Court implied a *Bivens* action as "complementary" to an existing remedial scheme. *Id.* at 20. Additionally, in *Davis v. Passman*, 442 U.S.

228 (1979), the Supreme Court held — despite Congress's exemption of its Members from liability under Title VII of the Civil Rights Act — that the plaintiff had a cause of action under the Fifth Amendment for damages arising from her dismissal from employment by a Congressman on the alleged basis of her gender, because the exemption did not "foreclose the judicial remedies of those expressly unprotected by the statute," *id.* At 247. Recently, the Supreme Court held that federal officials who use their power to retaliate against an individual through criminal prosecution for the exercise of First Amendment rights are "subject to an action for damages on the authority of *Bivens*," without discussing any alternative remedies that may exist. *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

Notably, except possibly in a military context,[3] neither the Supreme Court nor this court has denied a *Bivens* remedy where a plaintiff had no alternative remedy at all. For example in *Bush*, the Supreme Court stated that there was no need to reach the question whether the absence of any remedy could

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[3] Under step two of the *Bivens* analysis, the Supreme Court concluded in view of the "specificity" and "insistence" of the "explicit constitutional authorization for *Congress* '[t]o make Rules for the Government and Regulation of the land and naval Forces.' U.S. Const., Art. I, § 8, cl.14," *United States v. Stanley*, 483 U.S. 669, 681- 82 (1987), and "the unique disciplinary structure of the Military Establishment and Congress' activity in the field" regarding the military justice system, *id.* at 683 (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)), that it would be inappropriate to provide a *Bivens* action against a military official for injuries incident to military service, even though the plaintiff appeared to have no statutory remedy, *id.* at 683-84 (citing *Feres v. United States*, 340 U.S. 135 (1950)).

imply that courts should stay their hands, 462 U.S. at 378 n.14, because the plaintiff's claim of retaliatory demotion was addressed by the Civil Service Reform Act, which provided a partial remedy, *id.* at 386. Similarly, in *Chilicky*, 487 U.S. at 421, because the plaintiff's denial of disability benefits was covered by the Social Security Act, *id.* at 428, the Supreme Court determined that "Congress . . . ha[d] not failed to provide meaningful safeguards or remedies for the rights of persons situated as [were the plaintiffs]," *id.* at 425. In each instance a remedial scheme clearly encompassed the grievance underlying the plaintiff's alleged constitutional violation. So, too, in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), the Supreme Court did not extend *Bivens* liability to corporations, a new category of defendant, *id.* at 68-71, as the plaintiff had not only a *Bivens* action under the Eighth Amendment against an individual official but also "alternative remedies [that] [were] at least as great, and in many respects greater, than anything that could be had under *Bivens*," *id.* at 72. More recently in *Wilkie*, 127 S. Ct. at 2600-01, although the patchwork of remedies was not "an elaborate remedial scheme," *id.* at 2600 (quoting 462 U.S. at 388), sufficient to indicate that "Congress expected the Judiciary to stay its *Bivens* hand," *id.*, the Supreme Court denied a *Bivens* action in part because "[f]or each charge" the plaintiff "had some procedure to defend and make good on his position," including "the means to be heard," *id.* at 2599, through "an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." *id.* at 2600; *see also id.* at 2604.

Consistent with this precedent, where nothing "suggests that Congress intended to prevent [suits] . . . for constitutional violations against which [the statute] provides no protection at all," even where the statute provided remedies for other employment-based injuries, this court has entertained a *Bivens* remedy. *Ethnic Employees of Library of Cong. v. Boorstin*, 751 F.2d 1405, 1415 (D.C. Cir. 1985). Even when denying a *Bivens* remedy in *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988); *see* Op. at 11, 17, the en banc court emphasized that although the plaintiffs' claims did not receive the full protection under the Civil Service Reform Act, there could be "little doubt" that "Congress ha[d] brought [the plaintiffs'] claims . . . within [the statute's] ambit" as it "affirmatively sp[oke] to claims such as [the plaintiffs']" and "technically accommodate[d] [their] constitutional challenges," *id.* at 229.

Under step two, the Supreme Court has described the type of "special factors counselling hesitation." *Wilkie*, 127 S. Ct. at 2598 (citation and internal quotation marks omitted). Where the Constitution itself vests unique responsibility in Congress for the military, *see Stanley*, 483 U.S. at 681-84, or where a constitutional claim depends upon a government-created interest such as federal employment, benefits, or the availability of government information as in FOIA, the Supreme Court has considered whether "Congress is in a better position to decide" whether to create a particular damages remedy, *Chilicky*, 487 U.S. at 427 (quoting *Bush*, 462 U.S. at 390); *Bivens*, 403 U.S. at 396-97; *see Thomas v. Principi*, 394 F.3d 970, 975-76 (D.C. Cir. 2005); *Johnson v. Exec. Ofc. for U.S.*

Attys., 310 F.3d 771, 777 (D.C. Cir. 2002); *Spagnola*, 859 F.2d at 226-28. The Supreme Court also has considered the judicial manageability of "devising a workable cause of action," *Wilkie*, 127 S. Ct. at 2604; *see Davis*, 442 U.S. at 245.

II.

Applying the *Bivens* analysis demonstrates that reversal is required for Mr. Wilson's claims against all appellees and for one of Ms. Wilson's claims against three of the appellees.

A.

Mr. Wilson alleges that, in violation of the First Amendment, appellees intentionally retaliated against him for his constitutionally protected statements about the President's State of the Union Address by disclosing to various members of the press his wife's identity as an undercover agent with the Central Intelligence Agency ("CIA"), and thereby harming him and his family. Am. Compl. ¶¶ 19-49. In addition, he alleges that, in violation of the Fifth Amendment's equal protection requirement, appellees intentionally targeted him for unfavorable treatment different from those similarly situated without a legitimate basis. *Id.* ¶¶ 50-54.

At step one, the Privacy Act is not an alternative remedial scheme for Mr. Wilson's constitutional claims because he has no cause of action under the Act, *see Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1123 (D.C. Cir. 2007), but even assuming he could somehow obtain relief through

his wife's Privacy Act claim as the court suggests, Op. at 13-14, 17, the statute would provide none for the harm allegedly caused by three appellees not employed by an "agency." First, the Act creates a civil damages remedy "[w]henever any agency . . . fails to comply with any other provision of this section . . . in such a way as to have *an adverse effect on an individual*," 5 U.S.C. § 552a(g)(1)(D) (emphasis added), such as by violating the prohibition on the disclosure of an individual's "record which is contained in a system of records," *id.* § 552a(b). These provisions do not cover Mr. Wilson's claims due to the disclosure of information about his wife that is retrievable from agency records under her name, because the term "adverse effect" includes "*only* . . . a person whose records are actually disclosed." *Sussman*, 494 F.3d at 1123; 5 U.S.C. § 552a(4). Thus, the Privacy Act suggests nothing about the legal rights of an individual without an agency record who is harmed through the disclosure of someone else's agency record, *i.e.*, someone "expressly unprotected" by the statute, *Davis*, 442 U.S. at 247; *see Ethnic Employees*, 751 F.2d at 1415. The Act neither "affirmatively speaks to" nor "accommodates . . . [the] constitutional challenges," *Spagnola*, 859 F.2d at 229, brought by Mr. Wilson. *See also Dunbar Corp. v. Lindsey*, 905 F.2d 754, 762 (4th Cir. 1990).

The court's conclusion, therefore, that "[t]he presence of a comprehensive remedial scheme is . . . a sufficient reason for us to stay our hand" on *Bivens*, Op. at 16, is, at best, incomplete. A statutory scheme may be insufficient when it is comprehensive for some claims but not for others or for the plaintiff

alleging a harm that the statute does not purport to address. When a statute omits remedies for government officials' harm, its mere existence is an unconvincing reason to deny a *Bivens* remedy, as was the Civil Rights Act in *Davis*, 442 U.S. at 247, and the Federal Tort Claims Act in *Carlson*, 446 U.S. at 23. *See also Wilkie*, 127 S. Ct. at 2600 (quoting *Davis*, 442 U.S. at 245 (quoting *Bivens*, at 410 (Harlan, J., concurring in judgment))). An exception would occur where "the design [of the statute]. . . suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations," *Chilicky*, 487 U.S. at 423. *Bivens* embraces the notion that a constitutional claim and a statutory claim may be complementary, *see Carlson*, 446 U.S. at 20; *see also Bagola v. Kindt*, 131 F.3d 632, 642-44 (7th Cir. 1997). But an omission in the statute can mean that Congress either decided not to provide a damages remedy or did not contemplate much less decide "'what it considers adequate remedial mechanisms for constitutional violations that may occur,'" Op. at 10 (quoting *Chilicky*, 487 U.S. at 423), in a certain way or to a certain class of individuals. In sum, the comprehensiveness of a statute for some plaintiffs begs the key question of whether Congress has "not inadvertently omitted damages remedies for certain claimants," *Spagnola*, 859 F.2d at 228 (citation and internal quotation marks omitted); *see Wilkie*, 127 S. Ct. at 2598.

Second, in suggesting that Mr. Wilson could obtain some relief through his wife's potential claim under the Privacy Act, Op. at 13-14, 17, and thus that it is a comprehensive remedial scheme as to

him, the court appears to assume that a statutory exemption of certain offices must mean that Congress has not inadvertently denied a remedy, *id.* at 14-15, 17-18. But such an approach glosses over the question whether the Privacy Act in this case "amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," *Wilkie*, 127 S. Ct. at 2598. In four instances involving a congressional exemption of a category of defendant, the Supreme Court has proceeded to analyze whether it would be appropriate to imply a *Bivens* action. *See Malesko*, 534 U.S. at 70-74; *FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994); *Carlson*, 446 U.S. at 19-23; *id.* at 28 (Powell, J., concurring in judgment); *Davis*, 442 U.S. at 245-48. For example, although Congress had exempted its Members from liability under Title VII of the Civil Rights Act, the Supreme Court concluded in *Davis* that this did not demonstrate Congress's intention to deny a *Bivens* remedy. *See* 442 U.S. at 247. Acknowledging that a suit against a Member of Congress "for putatively unconstitutional actions taken in the course of his official conduct [did] raise special concerns," *id.* at 246, the Supreme Court concluded that "these concerns [were] coextensive with the protections afforded by the Speech or Debate Clause," *id.*, and left to the lower court to determine in the first instance whether the defendant's conduct was shielded by immunity, *id.* at 249. In so doing, the Supreme Court observed that "[o]ur system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law." *Id.* at 246 (quoting *Butz v. Economou*, 438 U.S. 478,

506 (1978) (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882))).

In the Privacy Act, 5 U.S.C. § 552a(a)(1), Congress adopted the definition of "agency" in the Freedom of Information Act ("FOIA"), *id.* § 552(f), without explanation. The legislative history of FOIA, *see* Op. at 15, makes clear that the exemption of the President and his close advisors[4] was simply designed to avoid a challenge that Congress lacked authority to force disclosure of the President's papers and communications with close advisors. *See* H.R. REP. NO. 93-1380 at 15 (1974) (Conf. Rep.), *reprinted in* H. COMM. ON GOV'T OPERATIONS, S. COMM. ON THE JUDICIARY, 94TH CONG., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, SOURCE BOOK II, at 231-32 (1975); *Soucie v. David*, 448 F.2d 1067, 1071-

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[4] In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), the Supreme Court held that the Office of the President is not an "agency," *id.* at 156 (citing H.R. REP. NO. 93- 1380, at 15 (1974) (Conf. Rep.)). In *Schwarz v. U.S. Department of Treasury*, No. 00-5453, 2001 WL 674636, at *1 (D.C. Cir. May 10, 2001), this court summarily affirmed the district court's holding that the Vice President's office is not an "agency," *see Schwarz v. U.S. Dep't of Treas.*, 131 F. Supp. 2d 142, 147-48 (D.D.C. 2000); *see also* Op. at 14, although the Vice President's participation in an Executive Branch entity does not automatically exempt it from the definition, *see Meyer v. Bush*, 981 F.2d 1288, 1295 n.7 (D.C. Cir. 1993).

72 & nn. 9-12 (D.C. Cir. 1971).[5] This is a far cry from indicating that Congress considered and decided to deny a *Bivens* remedy in the context at issue. The myriad procedural duties imposed on an "agency" by FOIA and the Privacy Act, *see, e.g.*, 5 U.S.C. §§ 552(a), (e), (g), (i)-(l); *id.* §§ 552a(b)-(f), reveal that the considerations relevant to the exemption of an office, *see, e.g.*, *Meyer*, 981 F.2d at 1291-93, are different from those relevant to whether a cause of action should be created for an individual who alleges First and Fifth Amendment violations by employees of the exempted offices.

In any event, the legislative history demonstrates that the Privacy Act was designed to add protection, not to eliminate existing remedies or those that might be developed by the courts. *See, e.g.*, S. REP. NO. 93-1183, at 2-3, 16, SOURCE BOOK ON PRIVACY at 155-56, 169; H.R. REP. NO. 93-1416 at 3 (1974), SOURCE BOOK ON PRIVACY at 296; 120 CONG. REC. 40,410 (1974) (statement of Sen. Muskie). Most significantly, the Senate Report states that the Privacy Act "*should not be construed*

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[5] The Conference Report accompanying the 1974 Amendments to FOIA stated:

> With respect to the meaning of the term "Executive Office of the President" [in 5 U.S.C. § 552(f)] the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

H.R. REP. NO. 93-1380, at 15, FOIA SOURCE BOOK II at 232; *see Meyer*, 981 F.2d at 1292 & n.1.

as a final statement by Congress on the right of privacy and other related rights as they may be developed or interpreted by the courts." S. REP. NO. 93-1183, at 15, SOURCE BOOK ON PRIVACY at 168 (emphasis added). The legislative history satisfies any "clear expression" requirement, *see Spagnola*, 859 F.2d at 229 (citing *Chilicky*, 487 U.S. at 423), as it makes manifest that Congress did not intend the Privacy Act to be a final or exclusive remedy but contemplated a continuing role for the courts. The court therefore errs in treating Congress's decision to exempt certain Executive offices from the Privacy Act as a "convincing" reason to refrain from implying a *Bivens* remedy, *Wilkie*, 127 S. Ct. at 2598.

To the extent the court relies on *Chung v. Dep't of Justice*, 333 F.3d 273, 274 (D.C. Cir. 2003), for the proposition that the Privacy Act is a *per se* comprehensive statute for *Bivens* purposes, Op. at 5, 12, its reliance is misplaced. *Chung* does not apply because Mr. Wilson has no cause of action or remedy against any appellee under the Act. In *Chung*, the plaintiff alleged the violation of his First and Fifth Amendment rights by agency officials (unnamed defendants) and pled a Privacy Act claim against their employer agency when his investigative cooperation was leaked. *See Chung v. Dep't of Justice*, No. Civ. 00-1912, 2001 WL 34360430, at *1-2 (D.D.C. 2001). This court affirmed the dismissal of his constitutional claims, adopting the district court's view that they were "encompassed within the remedial scheme of the Privacy Act," 333 F.3d at 274. This court provided no independent analysis, and the district court's holding that the Privacy Act

was comprehensive because the plaintiff's claims stemmed from an agency disclosure of his records, 2001 WL 34360430, at *12, was limited to a circumstance where the plaintiff, unlike Mr. Wilson, had a cause of action under the Act. Neither this court nor the district court addressed the legislative history discussed above. The other case cited by the court, Op. at 12; *see Downie v. City of Middleburg Heights*, 301 F.3d 688, 699 (6th Cir. 2002), also involved plaintiffs who had "a meaningful remedy" under the Privacy Act.

In sum, where courts have declined to imply a *Bivens* remedy notwithstanding omission of a damages remedy or exemption of a defendant category, there was an indication that Congress had considered "the rights of persons situated as [were the plaintiffs]," *Chilicky*, 487 U.S. at 425; *see Malesko*, 534 U.S. at 72; *Spagnola*, 859 F.2d at 229. No evidence here suggests that Congress meant the Privacy Act "to foreclose alternative remedies available to those not covered by the statute," *Davis*, 442 U.S. at 247. As our sister circuit has observed, where it "seems plain . . . that Congress never has given a moment's thought to the question of what sort of remedies should be available," *Krueger v. Lyng*, 927 F.2d 1050, 1057 (8th Cir. 1991), to an injured plaintiff such as Mr. Wilson, "Congress's failure to provide a remedy for constitutional wrongs suffered by [such a plaintiff] has been inadvertent" and the plaintiff "may proceed with his *Bivens* action." *See also Bagola*, 131 F.3d at 642; *Dunbar Corp.*, 905 F.2d at 762; *Ethnic Employees*, 751 F.2d at 1415. Given the text of the Privacy Act and the evidence of congressional intent, it is incongruous to

apply a statute designed to protect the privacy of an individual's agency records to preclude congressionally unforeseen constitutional claims by a stranger to the Act, *see Sussman*, 494 F.3d at 1123. Because Mr. Wilson is a person for whom Congress has "inadvertently omitted damages remedies," *Spagnola*, 859 F.2d at 228 (citation and internal quotation marks omitted), the Privacy Act is not a comprehensive remedial scheme as to him and implying a *Bivens* action for his claims would comport with precedent. *See Wilkie*, 127 S. Ct. at 2600; *Malesko*, 534 U.S. at 73-74; *Davis*, 442 U.S. 245; *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment); *Ethnic Employees*, 751 F.2d at 1414-15; *see also Munsell v. Dep't of Agric.*, 509 F.3d 572, 591 (D.C. Cir. 2007). To avoid this result, the court lumps the Wilsons' claims together, describing Mr. Wilson's claims as seeking damages for unconstitutional action taken in regard to information that once was covered by the Privacy Act. Op. at 13-14, 17. But the Constitution protects individual rights, not information, and whether Ms. Wilson might have a Privacy Act remedy is irrelevant to Mr. Wilson's independent claims based on public disclosures that were steps removed from internal government transfers, *see, e.g.*, 5 U.S.C. § 552a(b). The days when husband and wife were considered as one at law are long past. *See, e.g.*, *Rousey v. Rousey*, 528 A.2d 416, 417 & n.1 (D.C. 1987) (en banc).

At step two, the court acknowledges that neither the Intelligence Identities Protection Act of 1982 ("IIPA"), 50 U.S.C. §§ 421-26, which imposes criminal penalties for intentional disclosure of a

covert agent's identity to an unauthorized source in certain circumstances, nor the *Totten* doctrine,[6] which bars litigation of a claim involving an unacknowledged CIA agent's employment, applies. Op. at 18-19. That is, because the IIPA provides no civil remedies it is irrelevant to assessing whether Congress has created a comprehensive remedial scheme that it deems an adequate alternative to suits directly under the Constitution. Rather, a *Bivens* action would supplement the criminal scheme by imposing civil damages. And because the United States has acknowledged Ms. Wilson's prior covert CIA identity, there is no *Totten* problem. The court nonetheless, in a novel analysis, extends the disclosure concerns underlying the IIPA and the *Totten* doctrine, treating them as "valid considerations" weighing against implying a *Bivens* remedy, *id.* at 19, even though all of the cases the court cites are inapposite. The cat is out of the bag as Ms. Wilson's cover has already been compromised, *see Tenet*, 544 U.S. at 10, and these claims, as pled, do not depend upon the "forced disclosure of the identities of [the CIA's] intelligence sources," *CIA v. Sims*, 471 U.S. 159, 175 (1985). Besides, courts regularly entertain cases involving CIA agents, confidential information, and even matters relating to national security. *See, e.g., Tenet*, 544 U.S. at 10; *Webster v. Doe*, 486 U.S. 592, 604 (1988); *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007).

Likewise, the court's speculation that this litigation "would inevitably require judicial intrusion into matters of national security and sensitive

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[6] *Totten v. United States*, 92 U.S. 105 (1875); *see Tenet v. Doe*, 544 U.S. 1, 8 (2005).

intelligence information," Op. at 18, is unfounded and at best premature. It is unfounded because any concern about possible disclosure of secret or sensitive information has not prompted the United States to assert the state secrets privilege, *see United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *In re Sealed Case*, 494 F.3d at 142. At this stage of the proceedings this is hardly surprising inasmuch as the United States successfully prosecuted related obstruction-of-justice, perjury, and false-statements charges to a jury verdict, *see Libby*, 498 F. Supp. 2d at 2; *see also* Am. Compl. ¶¶ 20-22, 33-34. In any event, district courts are well-suited to protect secrets from unwarranted disclosures. *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008); *Webster*, 486 U.S. at 604; *In re Sealed Case*, 494 F.3d at 153. It is premature because "[t]here has been neither discovery nor any presentation to the district court of how [the Wilsons] will try to prove their claims." Appellants' Reply Br. at 2. As alleged, the claims depend upon the intent and effect of appellees' exposure of Ms. Wilson's covert identity to the press, relying on information already in the public domain. Concern regarding the disclosure of sensitive information in lawsuits against close Presidential advisors can be resolved under evidentiary rules, *see, e.g.*, *In re Sealed Case*, 494 F.3d 139, and the defense of immunity. As to the latter, the Supreme Court has instructed that "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording [these] officials [such as the Attorney General] an absolute immunity," *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985), and so

immunity questions should be addressed on their own merit rather than imported into the *Bivens* analysis. Hence, the court's disclosure concerns cannot serve as a special factor to "modify litigants' substantive rights as to either constitutional or statutory matters," *In re Sealed Case*, 494 F.3d at 143. Neither can the court's broad holding rely, Op. at 12, 17, on the limited concession that the Privacy Act is a special factor for Ms. Wilson's privacy claim against former Deputy Secretary of State Armitage, *see* Appellants' Br. at 18 n.3.

For these reasons the underlying rationale of *Bivens* and its progeny — "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,'" *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)), unless Congress has acted to the contrary in a "convincing" way or there are "special factors counseling hesitation," *Wilkie*, 127 S. Ct. at 2598 — instructs that the dismissal of Mr. Wilson's constitutional claims was erroneous. He has no alternative remedy and no special factors counsel caution against creating a cause of action for him. There is nothing novel about a *Bivens* remedy for a First Amendment retaliation claim against federal officials. *See, e.g.*, *Hartman*, 547 U.S. at 256; *Nat'l Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989); *Gibson v. United States*, 781 F.2d 1334, 1342 (9th Cir. 1986); *Ethnic Employees*, 751 F.2d at 1415; *Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977). A claim of denial of equal protection for a class of one has long been recognized, *see 3883 Conn. LLC v. Dist. of Columbia*,

336 F.3d 1068, 1075 (D.C. Cir. 2003) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)), and the Supreme Court's recent decision in *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008), does not affect Mr. Wilson as he was not a public employee when the alleged constitutional violations occurred. Mr. Wilson's claims, then, are the type for which *Bivens* contemplated a compensatory cause of action to deter government officials' violations of the Constitution, *see Malesko*, 534 U.S. at 70-71, 74; *FDIC*, 510 U.S. at 485; *Carlson*, 446 U.S. at 21-22; *Bivens*, 403 U.S. at 395-96; *id.* at 403, 408 (Harlan, J., concurring in judgment); *see also Wilkie*, 127 S. Ct. at 2600; *Hartman*, 547 U.S. at 256, and which the Privacy Act did not foreclose, *see, e.g.*, S. REP. NO. 93-1183, at 15, SOURCE BOOK ON PRIVACY at 168.

B.

Ms. Wilson alleges that in disclosing her covert identity appellees violated her Fifth Amendment rights to equal protection, privacy, and property. Am. Compl. ¶¶ 50-64.

For the claims that are inseparable from her public employment, Ms. Wilson has no "constitutionally recognized interest" at stake, *Wilkie*, 127 S. Ct. at 2598; *see Davis*, 442 U.S. at 236-38; *see also Dunbar Corp.*, 905 F.2d at 759. Under *Engquist*, because of the "unique considerations applicable when the government acts as employer as opposed to sovereign, . . . the class-of-one theory of equal protection does not apply in the public employment context." 128 S. Ct. at 2151. She also

has no due process protection for a non-existent property interest in her continued CIA employment. *See Doe v. Gates*, 981 F.2d 1316, 1320-21 (D.C. Cir. 1993); *cf. Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989).

However, the district court acknowledged that Ms. Wilson alleges a violation of a constitutional right to privacy under the Due Process Clause where public disclosure of information constituted a state-created danger, *see Butera v. Dist. Of Columbia*, 235 F.3d 637, 651-52 (D.C. Cir. 2001); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998); Am. Compl. ¶¶ 1, 21, 40-42, 55-58; *cf. Am. Fed. of Gov't Employees, AFL-CIO v. Dep't of Housing & Urban Devel.*, 118 F.3d 786, 791-93 (D.C. Cir. 1997).[7] In view of the design of the Privacy Act and Congress's intention in enacting it, and the absence of special factors counselling against a *Bivens* remedy, *see supra* Part II.A, I would remand this claim to the district court, except as to appellee Armitage for whose disclosure Ms. Wilson has a potential cause of action under the Privacy Act, 5 U.S.C. § 552a(g)(1), against his former agency, *see Ethnic Employees*, 751 F.2d at 1415. Except as to this appellee *Chung* is not dispositive, 333 F.3d at 274, for although Ms. Wilson's records are protected in some respects under the Privacy Act, three of the appellees are not covered by the Act and, as the legislative history shows, the exemption of the offices in which they work was unrelated to and reveals no consideration of the type of harm on which her endangerment claim is based. The Privacy Act thus

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[7] *See generally Totten*, 92 U.S. at 106; *Haig v. Agee*, 453 U.S. 280, 285 & n.7 (1981).

cannot be said to adequately protect her constitutional privacy interest or to reveal a congressional intent to bar this set of claims.

In conclusion, the court's decision is not the product of the application of the *Bivens* doctrine to appellants' claims as *Wilkie* directs, 127 S. Ct. at 2598. It is rather the result of the refusal to acknowledge precedent that *Bivens* is a remedial doctrine and absent special factors applies where Congress created statutory protection for some persons in some circumstances but did not address the type of constitutional claims alleged by Mr. Wilson and in part by Ms. Wilson. The disclosure concerns identified by the court as counselling hesitation are either unfounded or premature because there has been no discovery or presentation by the Wilsons to the district court of how they will attempt to prove their claims. Contrary to separation of powers, then, the court effectively cedes to Congress the judiciary's defined role to decide issues arising under the Constitution, despite the fact that the Privacy Act neither is nor purports to be a universal bar to all constitutional relief related to the release of agency records. Accordingly, I concur in Parts II and III.B of the court's opinion, and in the judgment regarding Ms. Wilson's equal protection and due process property claims, but I respectfully dissent from the affirmance of the dismissal of Mr. Wilson's First and Fifth Amendment claims against each appellee and Ms. Wilson's due process state-endangerment claims (except against appellee Armitage), and would leave to the district court to address in the first instance appellees' defenses of

immunity, *see, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Davis*, 442 U.S. at 249; *Butera*, 235 F.3d at 646.

Entered August 12, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5257

September Term, 2007
FILED ON: AUGUST 12, 2008

VALERIE PLAME WILSON AND JOSEPH C. WILSON, IV,
APPELLANTS

V.

I. LEWIS LIBBY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 06cv01258)

Before: SENTELLE, *Chief Judge*, HENDERSON and ROBERTS, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Michael C. McGrail
Deputy Clerk

Date: August 12, 2008

Opinion for the court filed by Chief Judge Sentelle.
Opinion concurring in part and dissenting in part filed by Circuit Judge Rogers.

Entered August 12, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5257

September Term 2007
06cv01258
Filed On: August 12, 2008 [1132635]

Valerie Plame Wilson and Joseph C. Wilson, IV,

Appellants

v.

I. Lewis Libby, et al.,

Appellees

ORDER

It is **ORDERED**, on the Court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Michael C. McGrail

Deputy Clerk

Entered July 19, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE PLAME WILSON, et al.,

Plaintiffs,

v.

I. LEWIS LIBBY, JR., et al.,

Defendants.

Civil Action No. 06-1258 (JDB)

MEMORANDUM OPINION

Plaintiffs Valerie Plame Wilson and Joseph C. Wilson IV bring this action against four high-level Executive Branch officials, including the Vice President of the United States and his former Chief of Staff, based on the widely-publicized disclosure of the fact that Mrs. Wilson worked as a covert operative for the Central Intelligence Agency. Plaintiffs allege that defendants undertook a concerted effort to reveal this information to reporters in order to retaliate against and discredit Mr. Wilson for his public criticism of the Bush Administration's handling of foreign intelligence prior to this country's military involvement in Iraq. The Wilsons have sued the defendants personally for

money damages based on claims brought directly under the First and Fifth Amendments of the Constitution and on a common-law tort claim for the public disclosure of private facts. Now pending before the Court are motions to dismiss filed by each of the four named defendants and the United States pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This is a case of some notoriety and public interest. The merits of plaintiffs' claims pose important questions relating to the propriety of actions undertaken by our highest government officials. Defendants' motions, however, raise issues that the Court is obliged to address before it can consider the merits of plaintiffs' claims. As it turns out, the Court will not reach, and therefore expresses no views on, the merits of the constitutional and other tort claims asserted by plaintiffs based on defendants' alleged disclosures because the motions to dismiss will be granted. For the reasons explained below, the Court finds that, under controlling Supreme Court precedent, special factors -- particularly the remedial scheme established by Congress in the Privacy Act -- counsel against the recognition of an implied damages remedy for plaintiffs' constitutional claims. The Court also finds that it lacks subject-matter jurisdiction over the tort claim because plaintiffs have not exhausted their administrative remedies under the Federal Tort Claims Act, which is the proper, and exclusive, avenue for relief on such a claim.

BACKGROUND[1]

In the 2003 State of the Union address, President George W. Bush told the nation that "[t]he British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." Am. Compl. ¶ 19(a). As it turned out, the veracity of the claim asserted in these "sixteen words" had previously been disputed to some degree within the Executive Branch. See id. ¶ 19(b). Newspaper articles published in May and June 2003 revealed that plaintiff Joseph C. Wilson IV, a former Senior Director for Africa at the National Security Council under President Clinton and the former U.S. ambassador to Gabon and São Tomé and Principé under President George H.W. Bush, id. ¶ 8, was sent to Niger in 2002 to investigate claims that Iraq had attempted to purchase uranium yellowcake from that country, id. ¶ 19(b), (i). Mr. Wilson's trip was reportedly taken at the behest of the CIA, in response to inquiries made by the Office of the Vice President into the alleged Iraqi activities. See id. Upon the conclusion of the Niger trip, and well before the State of the Union address, Mr. Wilson advised the CIA and the State Department that the allegations were based on

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[1] The circumstances giving rise to this action have been recounted extensively in the media, including in press coverage of the criminal trial against defendant I. Lewis Libby, Jr. that took place earlier this year. See United States v. Libby, No. 05-cr-394 (D.D.C.). It is therefore worth reiterating that the facts as recounted in this opinion are drawn from the amended complaint, which is presumed true and is liberally construed for purposes of a motion to dismiss. See, e.g., Leatherman v. Tarrant County Narcotics & Coordination Unit, 507 U.S. 163, 164 (1993).

forged documents and were wholly untrue. Id. ¶ 19(b), (i).

The first newspaper column recounting this information, which was published in the New York Times on May 6, 2003, referred to Mr. Wilson only as an unnamed former ambassador. Id. ¶ 19(b). In response to the article, defendant I. Lewis Libby, Jr., the Vice President's Chief of Staff and Assistant for National Security Affairs, id. ¶ 9, asked the Under Secretary of State for further information about the Niger trip, id. ¶ 19(c). The Under Secretary in turn directed the State Department's Bureau of Intelligence and Research to prepare a report on the trip. Id. On or before June 10, 2003, the Under Secretary received that report, which was labeled "Secret" and referred to Valerie Plame Wilson as a Weapons of Mass Destruction ("WMD") manager for the CIA. Id. ¶ 36. The particular paragraph mentioning Mrs. Wilson was prefaced with the letters "S/NF," which indicate that the information was both secret and not to be shared with foreigners. Id. Based on information gathered for this report, the Under Secretary informed Libby by early June 2003 that Mr. Wilson was the former ambassador in question. See id. ¶ 19(c). The Under Secretary also advised Libby by June 12, 2003, that Mr. Wilson's wife worked at the CIA and the scuttlebutt around the State Department was that she was involved in planning his trip. Id. ¶ 19(e). At about the same time, Libby spoke with a senior officer at the CIA, who told Libby that Mr. Wilson's wife worked at the CIA and was thought (erroneously) to have been responsible for Wilson's trip. Id. ¶ 19(f). Libby further learned from Vice President Cheney, who

obtained the information from the CIA, that Wilson's wife worked in the CIA's Counterproliferation Division. Id. ¶ 19(h). Libby additionally heard, sometime between June 1 and July 8, 2003, that Wilson's wife worked at the CIA from the Assistant to the Vice President for Public Affairs, who in turn had learned that information "from another government official." Id. ¶ 19(t).

When a second article about the sixteen words and the Niger trip was published in the Washington Post on June 12, 2003, it also referred to Wilson only as a retired ambassador. Id. ¶ 19(i). The author of the Post article, Walter Pincus, had contacted the Office of the Vice President prior to its publication. Pincus's call generated discussions in the Office of the Vice President that involved Libby, among others. Id. ¶ 19(g). Two days after the Post article was published, Libby met with a CIA briefer and "expressed displeasure that CIA officials were making comments to reporters critical of the Vice President's office." Id. ¶ 19(j). Furthermore, on June 13, 2003, defendant Richard L. Armitage, Deputy Secretary of the Department of State, met with reporter Bob Woodward in Armitage's office at the State Department and told Woodward that Mrs. Wilson worked as a WMD analyst at the CIA -- information he had learned from a State Department memorandum. Id. ¶ 37.

A third related article, entitled "The First Casualty: The Selling of the Iraq War," appeared in the online edition of The New Republic on June 19, 2003. Id. ¶ 19(k). This article again referred to Mr. Wilson as an unnamed ambassador and quoted him

anonymously as saying that officials in the Bush Administration "'knew the Niger story was a flat-out lie.'" Id. The article also accused the Bush Administration of suppressing dissent from the intelligence agencies with respect to Iraq's WMD capacity. Id. The publication of The New Republic article prompted further activity within the Office of the Vice President. Libby discussed the article with his principal deputy, who asked Libby whether he could counter the reports that Vice President Cheney had arranged for Mr. Wilson's trip by discussing that trip with journalists. Id. ¶ 19(l). Libby "responded that there would be complications at the CIA in disclosing that information publicly, and that he could not discuss the matter on a non-secure line." Id. Libby did, however, meet with reporter Judith Miller on June 23, 2003, and offered criticism of the CIA and "informed Miller that Wilson's wife might work at a bureau of the CIA." Id. ¶ 19(m).

Two additional publications are central to the events leading up to this action. First, an op-ed written by Mr. Wilson, entitled "What I Didn't Find in Africa," appeared in the July 6, 2003, edition of the New York Times. Id. ¶ 19(n). In that op-ed, Mr. Wilson asserted "that he had taken a trip to Niger at the request of the CIA in February 2002 to investigate allegations that Iraq had sought or obtained uranium yellowcake from Niger, . . . that he doubted Iraq had obtained uranium from Niger recently" and "that the Office of the Vice President had been advised of the results of his trip." Id. This information was also publicly conveyed by Mr. Wilson in the course of his appearance as a guest on the July 6 edition of the television show "Meet the

Press," and in an interview with a reporter that provided the basis for a July 6 Washington Post article about the Niger trip. Id.

Subsequently, on July 14, 2003, several national newspapers, including the Chicago Sun Times and The Washington Post, published a column by writer Robert Novak that discussed the Niger trip. Id. ¶ 14. Novak's column stated, in relevant part: "[Joseph] Wilson never worked for the CIA, but his wife, Valerie Plame, is an Agency operative on weapons of mass destruction. Two senior administration officials told me Wilson's wife suggested sending him to Niger . . . ." Id. The publication of Novak's column revealed to the public, for the first time, Mrs. Wilson's "previously secret and classified CIA identity." Id. The disclosure of this information "destroyed her cover as a classified CIA employee." Id. The Government has conceded that Mrs. Wilson's identity was classified in July 2003 and that her "cover was blown" when Novak's column was published. Id. ¶¶ 21, 22.

According to plaintiffs, "[t]here is evidence that multiple officials in the White House discussed [Valerie Wilson's] employment with reporters prior to . . . July 14." Id. ¶ 33 (quoting Gov't's Resp. to Def.'s Third Mot. to Compel Disc. at 30 n.10, United States v. Libby, No. 05-cr- 394 (D.D.C. Apr. 5, 2006)). For example, on or before July 8, 2003, Vice President Cheney informed Libby that President Bush "specifically had authorized Libby to disclose to New York Times reporter Judith Miller certain information from an October 2002 National Intelligence Estimate concerning Iraq and weapons

of mass destruction in order to rebut Mr. Wilson." Id. ¶ 19(q). Libby met with Judith Miller on July 8, 2003. Id. ¶ 19(r). Libby and Miller discussed Mr. Wilson's trip: Libby "criticized the CIA reporting concerning Wilson's trip" and "advised Miller of his belief that Wilson's wife worked at the CIA." Id. Also on that day, Libby asked the Counsel to the Vice President "in sum and substance, what paperwork there would be at the CIA if an employee's spouse undertook an overseas trip." Id. ¶ 19(s).

On July 10 or 11, 2003, Libby was told by a senior White House official, thought by plaintiffs to be defendant Karl C. Rove, that Robert Novak would be writing a story about Wilson's wife based on a conversation that Rove had with him earlier that week. Id. ¶ 19(u). Libby conversed with the press again himself on July 12, 2003. He spoke first with Matthew Cooper, who asked whether Libby had heard that Mr. Wilson's wife was involved in sending Mr. Wilson to Niger; Libby confirmed that he had also heard that information. Id. ¶ 19(w). Libby then spoke with Judith Miller and discussed the fact that Mr. Wilson's wife worked at the CIA. Id. ¶ 19(x).

Rove, who held several positions in the Bush White House, including Deputy Chief of Staff and head of the Office of Political Affairs, id. ¶ 10, also spoke with reporters during this time period. On July 11, 2003, Matthew Cooper of Time magazine called Rove at the White House. Id. ¶ 27. Rove spoke to Cooper on the condition that the conversation was on "deep background," meaning that Cooper could use the information provided by Rove but could not quote it or reveal its source. Id. Rove then told

Cooper that Mrs. Wilson worked "at the agency," clearly referring to the CIA, and that she "worked on 'WMD'" issues and had been responsible for sending Mr. Wilson to Niger. Id. ¶ 28. Rove ended the call by saying, "I've already said too much." Id. ¶ 29. According to Cooper, who later wrote a Time article about the incident entitled "What I Told the Grand Jury," his July 11 conversation with Rove was the first time he had heard about Mr. Wilson's wife. Id. ¶¶ 26, 28. Shortly after the publication of Novak's article, Rove also called Chris Matthews, the host of the television program "Hardball," and told him off the record that "Mr. Wilson's wife was 'fair game.'" Id. ¶ 30.

Plaintiffs also assert that Armitage spoke with reporters about Mrs. Wilson between the publication of Mr. Wilson's op-ed and the date of the Novak article. On July 6, 2003, the day that the op-ed appeared in the Times, Armitage directed that the Bureau of Intelligence and Research update its report on the Wilson trip and send the report to the Secretary of State. Id. ¶ 38. Armitage also met with Robert Novak at the State Department on July 8, 2003, and told Novak that Mrs. Wilson worked for the CIA on WMD issues. Id. ¶ 39.

The Wilsons initiated this lawsuit on July 13, 2006. The complaint originally named Libby, Rove, Cheney, and John Does 1-10 as defendants. The amended complaint, now the operative complaint, was filed on September 13, 2006, and substituted Armitage for one of the Doe defendants. Plaintiffs seek money damages for injuries they allegedly suffered as a result of the public disclosure of Mrs.

Wilson's covert operative status. In particular, plaintiffs assert that they both fear for their safety and the safety of their children because they are potential targets for "those persons and groups who bear hostility to the United States and/or its intelligence officers." Id. ¶ 42. Additionally, both plaintiffs allege that they have been impaired in pursuing professional opportunities, id. ¶ 44, and that Mrs. Wilson was unable to continue with her chosen career path at the CIA, id. ¶ 43.

Now pending before the Court are motions to dismiss filed by each of the four named defendants. The United States has also filed both a Statement of Interest and a motion to dismiss. On May 17, 2007, the Court heard argument on the many issues raised in these motions.

STANDARD OF REVIEW

All that the Federal Rules of Civil Procedure require of a complaint is that it contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. ___, 127 S. Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); accord Erickson v. Pardus, 551 U.S. ___, 127 S. Ct. 2197, 2200 (2007) (per curiam). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion to dismiss, to provide the "grounds" of "entitle[ment] to relief," a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of

action." Bell Atl. Corp., 127 S. Ct. at 1964-65; see also Papasan v. Allain, 478 U.S. 265, 286 (1986). Instead, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp., 127 S. Ct. at 1965 (citations omitted). Hence, although "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is impossible, and 'that a recovery is very remote and unlikely,'" id. (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)), the "threshold requirement" of Fed. R. Civ. P. 8(a)(2) is "that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief,'" id. at 1966 (quoting Fed. R. Civ. P. 8(a)(2)).

The notice pleading rules, however, are not meant to impose a great burden on a plaintiff. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005); see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-13 (2002). When the sufficiency of a complaint is challenged by a motion to dismiss under Rule 12(b)(6), the plaintiff's factual allegations must be presumed true and should be liberally construed in his or her favor. Leatherman v. Tarrant County Narcotics & Coordination Unit, 507 U.S. 163, 164 (1993); Phillips v. Bureau of Prisons, 591 F.2d 966, 973 (D.C. Cir. 1979); see also Erickson, 127 S. Ct. at 2200 (citing Bell Atl. Corp., 127 S. Ct. at 1965). The plaintiff must be given every favorable inference that may be drawn from the allegations of fact. Scheuer, 416 U.S. at 236; Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000). However, "the court need not accept inferences

drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Commc'n Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994); see also Domen v. Nat'l Rehab. Hosp., 925 F. Supp. 830, 837 (D.D.C. 1996) (citing Papasan, 478 U.S. at 286).

Under Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. See Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (noting that court has "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority"); see also Pitney Bowes, Inc. v. U.S. Postal Serv., 27 F. Supp. 2d 15, 18 (D.D.C. 1998). A court must accept as true all the factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1), and the plaintiff should receive the benefit of all favorable inferences that can be drawn from the alleged facts. See Leatherman, 507 U.S. at 164; EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624-25 n.3 (D.C. Cir. 1997).

ANALYSIS

Plaintiffs have asserted five causes of action in their amended complaint. Four are what are commonly known as Bivens claims: they seek money damages directly under the Constitution for alleged violations of plaintiffs' constitutional rights. See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). The fifth cause of action, for the

public disclosure of private facts, is asserted under District of Columbia tort law. Because defendants have raised arguments common to all of the Wilsons' Bivens claims, the Court will turn to them first.

I. Plaintiffs' Constitutional Claims

Each of plaintiffs' four Bivens claims is predicated on the alleged violation of a distinct constitutional right. The first claim, pled on Mr. Wilson's behalf alone, alleges that defendants Libby, Rove, and Cheney violated the First Amendment by disclosing Mrs. Wilson's covert status in order to retaliate against Mr. Wilson for exercising his speech rights. See Am. Compl. ¶¶ 46-49. The remainder of the Bivens claims are grounded in alleged Fifth Amendment violations. Both plaintiffs assert a cause of action against defendants Libby, Rove, and Cheney for the violation of plaintiffs' rights under the Equal Protection Clause. Am. Compl. ¶¶ 50-54. This "class of one" Equal Protection claim is premised on defendants having allegedly subjected plaintiffs to treatment different than that accorded to others similarly situated. See id. ¶¶ 51-52. See generally Vill. of Westbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (recognizing "class of one" Equal Protection claims). The third cause of action alleges that all four named defendants violated Mrs. Wilson's constitutional right to privacy -- specifically, a right to informational privacy with respect to her covert identity -- which plaintiffs argue is protected by the Due Process Clause, at least where the public disclosure of that information constitutes a statecreated danger. See Am. Compl. ¶¶ 55-58. Plaintiffs' final Bivens claim, which is

asserted under the procedural and substantive elements of the Due Process Clause, alleges that the four named defendants deprived Mrs. Wilson of a constitutionally protected property interest in her continued employment with the CIA. See id. ¶¶ 59-64.

Defendants have challenged each of these Bivens claims on qualified-immunity grounds. Under general qualified-immunity principles, government officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" Wilson v. Layne, 526 U.S. 603, 609 (1999) (quoting Conn v. Gabbert, 526 U.S. 286, 290 (1999)). Whether evaluated under this qualified-immunity analysis, or for failure to state a claim upon which relief can be granted, see Broudy v. Mather, 460 F.3d 106, 116 (D.C. Cir. 2006), defendants have raised substantial questions as to the viability of plaintiffs' constitutional claims. The Court need not resolve these questions, however, because all of plaintiffs' Bivens claims spring from a common event -- the alleged disclosure by defendants of Mrs. Wilson's identity as a covert CIA agent -- that implicates

"special factors counselling hesitation" in the recognition of a Bivens remedy.[2]

The special-factors analysis originated in the Bivens decision itself. The Supreme Court in Bivens implied a cause of action for money damages directly under the Constitution against federal officers who allegedly violated the plaintiff's Fourth Amendment rights. See 403 U.S. at 397. In weighing whether to recognize this implied private right of action, however, the Court noted that "[t]he present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." Id. at 396. Although the Bivens Court did not elaborate fully on the meaning of "special factors," the concept has since been applied where an "alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." Wilkie v. Robbins, 551 U.S. ___, 127 S. Ct. 2588, 2598 (2007). Furthermore, even in the absence of an existing remedial process, a district court should determine whether any other special factors weigh against the recognition of a new Bivens remedy. See id. This Court will follow the course recently laid out by the Supreme Court in Wilkie v. Robbins and begin with the question whether the existence of a comprehensive, remedial statutory scheme precludes plaintiffs' claims.

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[2] The Supreme Court has treated the special-factors analysis as a prudential matter that can be addressed prior to jurisdictional issues. See Schweiker v. Chilicky, 487 U.S. 412, 429 n.3 (1988). This Court therefore finds it unnecessary to reach defendants' argument that Mr. Wilson lacks standing to assert the First Amendment claim. Cf. Pub. Citizen v. U.S. Dist. Ct., 486 F.3d 1342, 1347-49 (D.C. Cir. 2007).

A. Comprehensive Remedial Scheme

The Supreme Court first declined to recognize a Bivens remedy because of the existence of an alternative remedial scheme in Bush v. Lucas, 462 U.S. 367 (1983). Bush presented the question whether a federal employee could obtain money damages under the First Amendment for an adverse personnel action taken against him in alleged retaliation for critical comments he had made about his employer to the news media. See id. at 369. The Supreme Court declined to recognize such a claim because a complex mix of legislation, executive orders, and detailed Civil Service Commission regulations comprised an "elaborate, comprehensive scheme" that provided substantive and procedural remedies for improper federal personnel actions. Id. at 385. Even though the Court assumed that "a federal right [had] been violated and Congress [had] provided a less than complete remedy for the wrong," id. at 373, it noted that the proper question was "not what remedy the court should provide for a wrong that would otherwise go unredressed." id. at 388. Rather, the Court asked "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy." Id. It answered no: "In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service." Id. at 389.

The Supreme Court revisited this line of special-factors analysis in Schweiker v. Chilicky, 487

U.S. 412 (1988), a case brought by recipients of Social Security disability benefits who sought money damages for alleged due process violations in the termination of those benefits. See id. at 420. After reviewing its prior pronouncements on the meaning of "special factors," the Court observed that

> the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies.

Id. at 423. The Court declined to recognize a Bivens claim for respondents because Congress had, through the Social Security Act, already "addressed the problems created by state agencies' wrongful termination of disability benefits. " Id. at 429. Although the Act did not provide for the exact remedy sought, i.e., money damages against the officials responsible for the wrongful terminations, id. at 424, the Court deferred to Congress as "the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program," id. at 429.

Just last month in Wilkie v. Robbins, 551 U.S. ___, 127 S. Ct. 2588 (2007), the Supreme Court again considered whether the existence of alternative means for protecting a constitutionally-based interest precluded a Bivens remedy. The plaintiff in Wilkie alleged that officials of the Bureau of Land Management violated his Fourth and Fifth Amendment rights when they undertook a prolonged course of "harassment and intimidation" in an effort to obtain an easement across his property. Id. at 2593. Although the plaintiff had "an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints," that process took the form of "an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules." Id. at 2600. The Court held that this "patchwork" of remedies was unlike the "'elaborate remedial scheme[s]'" that were designed to protect the interests of the plaintiffs in Bush and Chilicky, and could not definitively support an inference that "Congress expected the Judiciary to stay its Bivens hand." Id. (quoting Bush, 462 U.S. at 388). The Court ultimately concluded, however, that other special factors counseled against recognizing a Bivens remedy for the plaintiff's alleged injuries. See id. at 2604-05.

Relying on Bush and Chilicky, and fully consistent with Wilkie, the D.C. Circuit has gleaned several "general principles" governing when the existence of a statutory remedial scheme counsels hesitation in creating a Bivens remedy. Spagnola v. Mathis, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (per curiam). "If the comprehensiveness of a

statutory scheme cannot be gainsaid and it appears that 'congressional inaction [in providing for damages remedies] has not been inadvertent[,]' courts should defer to Congress' judgment with regard to the creation of supplemental Bivens remedies." Id. at 227-28 (alterations in original) (quoting Chilicky, 487 U.S. at 423). When these circumstances exist, "courts must withhold their power to fashion damages remedies" unless Congress has "plainly expressed an intention that the courts preserve Bivens remedies." Id. at 228. Furthermore, "the Chilicky Court made clear that it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." Id. at 227. Applying these principles, the D.C. Circuit has held that, for purposes of the special-factors analysis, the Civil Service Reform Act ("CSRA"), Title VII, and the congressionally created administrative process governing veterans' benefits decisions are all comprehensive statutory schemes precluding Bivens remedies. See Thomas v. Principi, 394 F.3d 970, 975-76 (D.C. Cir. 2005) (veterans' benefits); Spagnola, 859 F.2d at 229 (CSRA); Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405, 1415 (D.C. Cir. 1985) (Title VII).

Defendants in this action argue that two statutes, whether considered independently or in combination, counsel hesitation under the special-factors analysis. The first and most important of these statutes is the Privacy Act, 5 U.S.C. § 552a (2000), which "regulate[s] the collection, maintenance, use, and dissemination of information" about individuals by federal agencies. Privacy Act of

1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896, 1896. The second statute, the Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421-426 (2000), criminalizes the intentional public disclosure of information identifying a covert agent.[3] Defendants contend that by enacting these statutes, Congress considered the proper recourse for individuals whose personal information has been improperly disclosed by government officials -- the alleged activity giving rise to plaintiffs' claims. Furthermore, the absence in these statutory schemes of a civil damages action against the offending officials was not inadvertent, and Congress has not plainly expressed an intention

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[3] Libby also suggests that the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.), which governs personnel actions taken against federal employees, precludes any Bivens remedy here. He argues that, to the extent plaintiffs' claims involve adverse effects on Mrs. Wilson's employment, those claims fall within the purview of, and thus are precluded by, the CSRA. Libby's Mem. in Support of Mot. to Dismiss at 13; see, e.g., Spagnola, 859 F.2d at 228-29. Armitage makes a similar argument based on the internal grievance procedures available to CIA employees. Armitage's Mem. in Support of Mot. to Dismiss at 13-14. See generally U.S. Gen. Accounting Office, GAO/NSIAD-96-6, Intelligence Agencies: Personnel Practices at CIA, NSA, and DIA Compared with Those of Other Agencies 31 (1996) (describing CIA grievance procedures).

Although plaintiffs allege that Mrs. Wilson was unable to continue with her work as a covert CIA operative as a result of defendants' actions, see Am. Compl. ¶¶ 14, 43, they have not alleged that any adverse employment actions were taken against Mrs. Wilson, or otherwise described any actions taken against Mrs. Wilson by her employer. The crux of plaintiffs' claims concerns the alleged disclosure of private information -- conduct that is not addressed by the CSRA or the CIA grievance procedures one way or the other.

that the courts preserve Bivens remedies. Therefore, defendants argue, this Court should not imply additional damages remedies under the Constitution.

Plaintiffs respond as an initial matter that the special-factors analysis urged by defendants is less compelling, if not irrelevant, because their complaint alleges violations of constitutional provisions that have given rise to viable Bivens claims in the past. In support of this argument, plaintiffs cite Davis v. Passman, 442 U.S. 228, 248 (1979), in which the Supreme Court permitted a damages action directly under the Due Process Clause of the Fifth Amendment, and two cases in which the D.C. Circuit recognized Bivens claims for First Amendment violations, see Haynesworth v. Miller, 820 F.2d 1245, 1255 (D.C. Cir. 1987), overruled in part on other grounds by Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695 (2006); Dellums v. Powell, 566 F.2d 167, 194 (D.C. Cir. 1977). As defendants point out, however, Bivens actions are not recognized Amendment by Amendment in a wholesale fashion. Rather, they are context-specific. "For example, a Bivens action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others." FDIC v. Meyer, 510 U.S. 471, 484 n.9 (1994). Notably, the Supreme Court has "consistently refused to extend Bivens liability to any new context" in the twenty-seven years since Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment). Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001); see also Wilkie, 551 U.S. at ___, 127 S. Ct. at 2597 ("[I]n most instances we have found a Bivens remedy unjustified.").

Thus, it is not enough for plaintiffs to point to cases recognizing Bivens actions under the First and Fifth Amendments generally. Although damages actions have been permitted under the First Amendment against federal officials who instituted criminal prosecutions in retaliation for the exercise of protected speech rights, see Hartman, 126 S. Ct. at 1701; see also Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 190 & n.22 (D.C. Cir. 2006), the Supreme Court has nonetheless "declined to create a Bivens remedy against individual Government officials for a First Amendment violation arising in the context of federal employment," Malesko, 534 U.S. at 68 (citing Bush v. Lucas). And while Davis established that a congressional employee may assert a Bivens remedy under the Due Process Clause for unconstitutional employment discrimination, see 442 U.S. at 248, the Supreme Court later refused to imply a remedy under the Due Process Clause for the improper denial of social security disability benefits, see Chilicky, 487 U.S. at 420. The proper question, then, is not whether plaintiffs may assert a Bivens remedy for a First or Fifth Amendment violation, but whether they may do so on the basis of the disclosure by federal officials of allegedly private information concerning Mrs. Wilson that was maintained within the Executive Branch. Answering this question requires consideration of the Privacy Act.

1. Privacy Act

The Privacy Act, as noted, regulates how federal agencies maintain and disseminate information pertaining to individuals. Among its requirements, the Act prohibits the disclosure of

"any record which is contained in a system of records by any means of communication to any person, or to another agency," unless the disclosure occurs pursuant to the request of the individual to whom the record pertains, or if one of twelve enumerated exceptions to the disclosure prohibition applies. § 552a(b). Agencies must account for certain types of disclosures made under these provisions. § 552a(c). The Act also "provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with [its] requirements." Doe v. Chao, 540 U.S. 614, 618 (2004). One such form of relief enables an individual to seek money damages when an agency intentionally or willfully fails to comply with the disclosure requirements "in such a way as to have an adverse effect on an individual." § 552a(g)(1)(D), (g)(4). Although Congress did not create a civil cause of action against individual government officials for violations of the Act, those agency officers or employees who improperly disclose information covered by the Act face possible criminal penalties. See § 552a(i)(1).

The D.C. Circuit has already confirmed that the Privacy Act may constitute a comprehensive statutory scheme precluding Bivens remedies against government officials who improperly disclose a plaintiff's personal information. See Chung v. U.S. Dep't of Justice, 333 F.3d 273, 274 (D.C. Cir. 2003), aff'g in relevant part, No. 00-cv-1912, 2001 WL 34360430, at *10-*12 (D.D.C. Sept. 20, 2001). In doing so, it has joined a number of courts from other circuits, including the Court of Appeals for the Sixth Circuit. See Downie v. City of Middleburg Heights,

301 F.3d 688, 698-99 (6th Cir. 2002); Khalfani v. Sec'y, Dep't of Veterans Affairs, No. 94-cv-5720, 1999 WL 138247, at *7 (E.D.N.Y. Mar. 10, 1999); Sullivan v. U.S. Postal Serv., 944 F. Supp. 191, 195-96 (W.D.N.Y. 1996); Williams v. Dep't of Veteran Affairs, 879 F. Supp. 578, 587-88 (E.D. Va. 1995); Patterson v. FBI, 705 F. Supp. 1033, 1045 n. 16 (D.N.J. 1989). The plaintiff in Chung brought an action against Department of Justice officials who disclosed information to journalists revealing Chung's participation in a confidential investigation. See 2001 WL 34360430, at *10-*12. Chung alleged that "he suffered substantial emotional distress and mental anguish, fearing for his life and the lives of his family members" as a result of the publication of national news stories describing his role in the investigation. Id. at *1. The court of appeals affirmed "the dismissal of Chung's constitutional claims because, as the district court correctly held, they are encompassed within the remedial scheme of the Privacy Act." 333 F.3d at 274. As the district court noted, Congress has, with the Privacy Act, "crafted what it considers to be appropriate remedies for disclosure and record access violations." Id. at *10 (quoting Williams, 879 F. Supp. at 587). Furthermore, the congressional findings accompanying the Act make it "quite clear that Congress found constitutional implications and concerns respecting privacy matters as part of its reason for enacting the Privacy Act of 1974." Id. at *11. "Given the extensiveness of this remedial scheme, its failure to include additional remedies, such as damages against individual officials or punitive damages, does not appear to be inadvertent." Id. at *10 (quoting Williams, 879 F.

Supp. at 587). Accordingly, the district court in Chung declined to supplement the Privacy Act with additional Bivens remedies.

Chung has since been applied by two other judges of this Court on facts also very similar to those alleged in this action. In Hatfill v. Ashcroft, 404 F. Supp. 2d 104 (D.D.C. 2005), Judge Walton dismissed a Fifth Amendment Bivens claim asserted against unnamed federal officials by Steven Hatfill, who was publicly named a "person of interest" in connection with the anthrax attacks that terrorized the northeast United States in 2001. See id. at 116. Hatfill alleged that the officials conspired to release false information about him to the public in order to "render him unemployable in his field of chosen profession," namely, "biowarfare preparedness and countermeasures." Id. at 113, 115. The district court held that "the Privacy Act, being a comprehensive legislative scheme that provides a meaningful remedy for the kinds of harm Dr. Hatfill alleges he has suffered, qualifies it [as] a special factor counselling hesitation against the applicability of Bivens." Id. at 116.

Likewise, the plaintiff in Sudnick v. Dep't of Defense, 474 F. Supp. 2d 91 (D.D.C. 2007), filed suit against an official at the Department of Defense ("DoD") who allegedly "publicly stigmatiz[ed] [plaintiff] through a campaign of making false representations and allegations against [plaintiff] within and outside of DoD, including to print and broadcast media." Id. at 98 (second and third alterations in original). The plaintiff sought a Bivens remedy under the Fifth Amendment on the ground

that the disclosures "deprived him of the liberty to work in his chosen field as a senior manager in a government agency." Id. at 98. In an opinion released after the briefing in this action was completed, Judge Huvelle dismissed the claim, which was "based entirely on [defendant's] alleged disclosure of 'Privacy Act-covered information pertaining to [plaintiff],'" for the reasons stated in Chung. Id. at 100 (second alteration in original).

Plaintiffs attempt to distinguish these cases by suggesting that their claims, unlike those of Chung and Hatfill, simply fall outside of the Privacy Act's scope altogether. In support of this argument, they observe that both Chung and Hatfill pled Privacy Act claims in addition to seeking Bivens remedies. Pls.' Mem. in Opp'n to Mots. to Dismiss at 53-54. Plaintiffs then contend that the Act is a "highly technical statute" that only applies to a subset of federal agency records, and there is "no factual predicate" for the presumption that the alleged disclosures here involved information covered by the Act. Id. Taking the amended complaint's allegations as true, however, Libby learned about Mrs. Wilson's employment from various sources within the CIA, the State Department, and the Office of the Vice President. Am. Compl. ¶ 19. Vice President Cheney obtained the information from the CIA. Id. ¶ 19(h). Armitage learned about Mrs. Wilson from a State Department memorandum. Id. ¶ 37. Although there are no allegations explicitly naming the source of Rove's knowledge, the only logical inference that can be drawn from the facts that are asserted in the amended complaint is that Rove learned about Mrs.

Wilson from one of the aforementioned sources: the CIA, a White House office, or the State Department.

Notably, plaintiffs do not contest that the Department of State and the CIA are federal agencies required to abide by the Privacy Act's disclosure requirements.[4] To the extent plaintiffs are suggesting that Bivens claims can only fall within the scope of the Privacy Act for purposes of the special-factors analysis when they are pled in terms of the Privacy Act's requirements, the Court simply does not agree. Otherwise, any plaintiff could assert a Bivens claim in lieu of an arguably less-desirable Privacy Act claim by way of artful pleading.

The Wilsons do contest the application of the Privacy Act to the Office of the Vice President, which they argue is not an agency and therefore does not come within the Act's purview for special-factors purposes. The Privacy Act defines "agency" by reference to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2000). See § 552a(a)(1) (cross-referencing FOIA § 552(e), now codified at § 552(f)). FOIA, in turn, defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." § 552(f)(1). Despite the statute's

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[4] Although the Director of the Central Intelligence Agency may promulgate regulations exempting records maintained by the CIA from some Privacy Act obligations, see § 552a(j)(1), he or she may not do so with respect to the Act's disclosure requirements, see § 552a(j).

explicit reference to the Executive Office of the President, the Supreme Court has held on the basis of "unambiguous" legislative history that the Office of the President does not fall within FOIA's definition of "agency." See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (citing H.R. Rep. No. 93-1380 ("FOIA Conference Committee Report"), at 15 (1974) (Conf. Rep.)). The vast majority of courts faced with the issue in the Privacy Act context have followed Kissinger in holding that the Office of the President and the Vice President do not fall within the Privacy Act's definition of agency. See, e.g., Jones v. Exec. Office of President, 167 F. Supp. 2d 10, 19 (D.D.C. 2001); Dale v. Exec. Office of President, 164 F. Supp. 2d 22, 26 (D.D.C. 2001); see also Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 55 (D.D.C. 2002) (Office of Vice President); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 147-48 (D.D.C. 2000) (same). But see Alexander v. FBI, 971 F. Supp. 603, 606-07 (D.D.C. 1997).

This Court does not need to resolve the issue here. Even assuming that the Office of the Vice President is not an agency under the Privacy Act for the reasons given in Kissinger, it still comes within the purview of the Act for purposes of the special-factors analysis. It is enough to observe that Congress contemplated whether the Privacy Act should adopt a definition of agency that explicitly excluded "units in the Executive Office whose sole function is to advise and assist the President," FOIA Conference Committee Report at 15, and then did so. As the district court in Jones explained with reference to conference reports and floor debates,

"[t]here is every indication from the legislative history that the drafters of the Privacy Act, in choosing to apply the FOIA definition of 'agency' to the Privacy Act, were cognizant of the Conference Committee Report prepared in connection with the 1974 FOIA Amendments." Jones, 167 F. Supp. 2d at 19. Furthermore, the Conference Committee Report suggests congressional awareness of the potential constitutional difficulties that would arise from the inclusion of close presidential advisors within the definition of "agency." See FOIA Conference Committee Report at 15 (stating intention to codify Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), in which D.C. Circuit observed potential difficulties of applying FOIA to the Executive, see id. at 1071-72 & nn.9-12). Thus, this Court concludes that if the Office of the Vice President is exempt from the requirements of the Privacy Act, that exemption "has not been inadvertent," see Chilicky, 487 U.S. at 423.

Plaintiffs also attempt to distance themselves from Chung and Hatfill on the slightly different ground that the Privacy Act afforded a possible remedy to the plaintiffs in those cases but does not afford a possible remedy to plaintiffs here. Assuming arguendo that the Wilsons do not have any potential Privacy Act remedies for at least some of the alleged disclosures, there is language from the district judges in Chung and Hatfill that, when read in isolation, might seem to support plaintiffs' view. See Hatfill, 404 F. Supp. 2d at 116 ("[T]he Privacy Act, being a comprehensive legislative scheme that provides a meaningful remedy for the kinds of harm Dr. Hatfill alleges he has suffered, qualifies it [as] a

special factor counselling hesitation against the applicability of Bivens."); Chung, 2001 WL 34360430, at *10 ("Congress has specifically addressed the circumstances alleged by Williams and has provided significant and meaningful remedies that he may pursue." (quoting Williams, 879 F. Supp. at 587)); see also Downie, 301 F.3d at 696; Sudnik, 474 F. Supp. 2d at 100. But these cases cannot stand for the proposition that a statutory scheme must provide "meaningful remedies" to a plaintiff in order to preclude a Bivens claim under the special-factors analysis. The D.C. Circuit has clearly indicated that a Bivens remedy may be precluded by a statutory scheme that provides a plaintiff with "'no remedy whatsoever.'"[5] Spagnola, 859 F.2d at 228 (quoting Chilicky, 487 U.S. at 423). Other circuits have held exactly that with respect to the CSRA. See Lee v. Hughes, 145 F.3d 1272, 1275 (11th Cir. 1998) (dismissing Bivens claim brought by plaintiff for whom CSRA provided no judicial or administrative remedies); accord Saul v. United States, 928 F.2d 829, 840 (9th Cir. 1991); Lombardi v. Small Bus. Admin., 889 F.2d 959, 961 (10th Cir. 1989); Volk v. Hobson, 866 F.2d 1398, 1403-04 (Fed. Cir. 1989).

These courts have followed to its logical conclusion the Supreme Court's directive to defer to Congress's judgment when Congress has constructed "an elaborate remedial system" encompassing a plaintiff's claim. Bush, 462 U.S. at 388. This deference is no less proper when Congress denies

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[5] The D.C. Circuit did not face that situation directly in Spagnola because the plaintiffs had a limited administrative remedy under the CSRA. See 859 F.2d at 225-26 & n.9.

rather than provides a remedy to certain classes of plaintiffs or claims. See Lee, 145 F.3d at 1276 ("In light of Congress's deliberate exclusion of certain employees from the protections of the CSRA and this country's long-respected separation of powers doctrine, courts should be hesitant to provide an aggrieved plaintiff with a remedy where Congress intentionally has withheld one."). As the Supreme Court observed in Bush, the relevant question in such a situation "is not what remedy the court should provide for a wrong that would otherwise go unredressed," but instead whether a carefully constructed statutory scheme "should be augmented by the creation of a new judicial remedy." 462 U.S. at 388; see also Chilicky, 487 U.S. at 421-22 ("The absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."). To the extent that plaintiffs lack a Privacy Act remedy here, then, it is because Congress failed to provide relief for individuals in plaintiffs' position, and has not done so inadvertently. For the Court nonetheless to provide those remedies would upset the careful balance created by the statutory scheme. The Court finds, therefore, that the Privacy Act is a special factor counselling against the implication of a Bivens remedy for plaintiffs' claims.

Finally, plaintiffs assert that a Bivens remedy is necessary because for them, as for the plaintiffs in Bivens and Davis, "it is damages or nothing." See Pls.' Opp'n at 51 (quoting Davis, 442 U.S. at 245; Bivens, 403 U.S. at 410 (Harlan, J., concurring in judgment)). Of course, as just explained, the

adequacy of some other remedy is not determinative. See Bush, 462 U.S. at 372- 73; Spagnola, 859 F.2d at 227. Moreover, the Supreme Court has indicated that it is the availability of an alternative avenue of relief, rather than the plaintiff's level of success in pursuing other remedies, that is the relevant consideration. The plaintiff in Wilkie, for example, "took advantage of some opportunities, and let others pass; although he had mixed success, he had the means to be heard." Wilkie, 551 U.S. at __, 127 S. Ct. at 2599. Thus the Court held that the "situation does not call for creating a constitutional cause of action for want of other means of vindication." Id. at 2600 (emphasis added)); see also Malesko, 534 U.S. at 74 (noting that plaintiff's "lack of alternative tort remedies was due solely to strategic choice" and therefore he was "not a plaintiff in search of a remedy"). But the Supreme Court has never directly answered the question "whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary." Bush, 462 U.S. at 378 n.14 (emphasis added); see also Malesko, 534 U.S. at 72. But cf. Tenet, 544 U.S. at 8 (dismissing due process claims against Director of Central Intelligence as non-justiciable under Totten doctrine). The courts of appeals, however, have not hesitated to dismiss Bivens actions under such circumstances when special factors are present. See, e.g., Lee, 145 F.3d at 1275 ("[M]ore recent Supreme Court cases do not reflect the Davis Court's willingness to recognize a Bivens claim in instances where there is a clear congressional intent to exclude

certain classes of employees from a statute's comprehensive remedial scheme.").

This Court would not hesitate either, were it actually confronted with the issue. As an initial matter, it appears that plaintiffs could have stated colorable Privacy Act claims based on some of the alleged disclosures, particularly those involving information allegedly learned by Armitage from a State Department memorandum. See § 552a(g)(1)(D), (g)(4). Furthermore, plaintiffs have asserted a state-law tort claim against the individual federal officials named in this action. Although this cause of action has now been converted into an FTCA claim against the United States, see infra, it nonetheless negates plaintiffs' assertion that a Bivens claim must be implied because they are left without any other possible remedy.[6]

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[6] Carlson v. Green, 446 U.S. 14 (1980), is not to the contrary. Carlson held that the possibility of an FTCA claim does not preempt a Bivens claim based on the same underlying allegations. Id. at 23. Unlike in Davis, however, the Court in Carlson did not imply a Bivens remedy based on a "damages or nothing" rationale. See Malesko, 534 U.S. at 70 (distinguishing between rationales of Carlson and Davis); Holly v. Scott, 434 F.3d 287, 295-96 (4th Cir. 2006) (same). Instead, Carlson created a Bivens action to "provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally," Malesko, 534 U.S. at 70, where Congress had "made it crystal clear" that the FTCA and Bivens were "parallel, complementary causes of action," Carlson, 446 U.S. at 20, and "no special factors counseling hesitation" were present, id. at 19.

Plaintiffs' failure to exhaust their FTCA remedies cannot justify the recognition of their Bivens claims. If that were true, plaintiffs could seek perhaps greater remedies under a Bivens implied right of action than they otherwise would

2. Intelligence Identities Protection Act

Defendants have also asserted that the Intelligence Identities Protection Act of 1982 ("IIPA") is a comprehensive statutory scheme barring plaintiffs' Bivens claims. See Pub. L. No. 97-200, 96 Stat. 122 (codified as amended at 50 U.S.C. §§ 421-426 (2000)). The IIPA prohibits the intentional disclosure of information identifying a covert agent and subjects an individual making such a disclosure to fines and a prison sentence of up to ten years. § 421. It does not provide for civil enforcement or for any other civil remedies. Defendants contend that Congress exhaustively considered the appropriate means of preventing the disclosure of a covert operative's identity when it passed the IIPA and made the calculated decision to impose criminal sanctions to the exclusion of civil remedies. In support of the argument that the lack of civil remedies was deliberate, Libby contrasts the IIPA with the Foreign Intelligence Surveillance Act of 1978, which provides for private causes of action in addition to criminal penalties. See 50 U.S.C. §§ 1809, 1810 (2000).

One of Congress's goals in enacting the IIPA certainly was "to protect intelligence officers and sources from [the] harm" that results from the disclosure of covert identities. S. Rep. No. 97-201, at 11 (1981). But defendants do not cite, and the Court is unaware of, any legislative history indicating that Congress rejected or even considered the possibility of civil remedies for such disclosures. If anything,

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have obtained had they been more diligent in protecting their statutory rights.

the legislative history shows that Congress was responding to a series of high-profile incidents in which individuals had purposefully put covert agents at risk, and the IIPA was a targeted effort to punish such behavior criminally. See, e.g., S. Rep. No. 97-201, at 1 (referencing "systematic effort by a small group of Americans . . . to disclose the names of covert intelligence agents" and noting that "[n]umerous proposals have been made . . . for a criminal statute to punish such disclosure"); id. at 8-9 (characterizing IIPA as "a definitive affirmation . . . that anyone who engages in . . . identification and exposure of the identities of [undercover agents] should be punished"). More generally, defendants have not been able to point to any case in which a criminal statute has been found to constitute a Bivens special factor. In this Court's view, the existence of a purely criminal statute that provides for no civil remedies at all cannot fairly be said to constitute a comprehensive remedial statutory scheme for purposes of assessing the availability of a Bivens remedy. See Bush, 462 U.S. at 388 (asking "whether an elaborate remedial system . . . should be augmented by the creation of a new judicial remedy" (emphasis added)). Criminal provisions are generally not remedial, and extending the special-factors analysis to defer to criminal statutes would radically alter the analytical framework that the Supreme Court has cautiously employed. This Court is thus not willing to say that the IIPA, standing alone, constitutes an "alternative, existing process for protecting the interest" of plaintiffs for purposes of the Bivens analysis. Wilkie, 551 U.S. at ___, 127 S. Ct. at 2598. That is not to say that the IIPA is altogether irrelevant to the special-factors analysis.

Certainly it is, incombination with the Privacy Act and other special factors discussed below, part of the panoply of reasons weighing against the judicial creation of a new Bivens cause of action. See id. at 2600.

B. Other Special Factors Counselling Against a Bivens Remedy

Even if this Court did not conclude that the Privacy Act is a comprehensive remedial scheme "amount[ing] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," id., plaintiffs' claims would nonetheless fail under "step two" of the Bivens analysis, which requires "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done." Id. As the Supreme Court has recently noted in Wilkie, "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest." Id. at 2597. In this case, the Bivens remedy requested by plaintiffs -- a cause of action implied under the Constitution for the alleged disclosure of Mrs. Wilson's status as a covert CIA operative -- raises significant separation-of-powers and justiciability concerns. Given these considerations, this Court believes that the decision whether to recognize a new Bivens remedy in this context "'is more appropriately for those who write the laws, rather than for those who interpret them.'" Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208

(D.C. Cir. 1985) (quoting Bush, 462 U.S. at 380); see also Wilkie, 551 U.S. at __, 127 S. Ct. at 2604-05.

Defendants argue that creating a private right of action for the disclosure of covert identity would "be inimical to" the Executive Branch's broad exercise of discretion to protect information pertaining to national security. See Rove's Mem. in Support of Mot. to Dismiss at 18. "The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief' and "exists quite apart form any explicit congressional grant." Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988). Of course, Congress has acknowledged the need for Executive Branch discretion over intelligence matters in a number of its enactments, including in the National Security Act, which "vested in the Director of Central Intelligence [now the Director of National Intelligence] very broad authority to protect all sources of intelligence information from disclosure," CIA v. Sims, 471 U.S. 159, 168-69 (1985); see National Security Act of 1947, ch. 343, § 102(d)(3), 61 Stat. 495, 498 (current version at 50 U.S.C.A. § 403-1(i) (2007)), and in statutory exemptions for the CIA from certain Privacy Act requirements, see § 552a(j)(1). Defendants note that the IIPA is also consistent with this discretion because it criminalizes the disclosure of only that information the United States "is taking affirmative measures to conceal," § 421, and enforcement of the Act is left to the government's prosecutorial discretion.

The need to maintain Executive Branch discretion regarding the protection of national

security information raises serious questions of justiciability with respect to a civil damages remedy for unauthorized disclosure of covert identity. In particular, the doctrine established in Totten v. United States, 92 U.S. 105 (1876), "prohibit[s] suits against the Government based on covert espionage agreements." Tenet v. Doe, 544 U.S. 1, 3 (2005). The Totten Court stated "as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." 92 U.S. at 107 (emphasis added). This broad prohibition applies to suits alleging constitutional violations: "No matter the clothing in which alleged spies dress their claims, Totten precludes judicial review in cases . . . where success depends upon the existence of their secret espionage relationship with the Government." Tenet, 544 U.S. at 8; see id. (dismissing due process claim).

Plaintiffs argue that the Totten doctrine does not apply in this case because the relationship between Mrs. Wilson and the CIA has been publicly revealed. For a slightly different reason, this Court agrees that Totten does not squarely apply to plaintiffs' claims. The Government has officially acknowledged, in documents filed in the Libby criminal case and at oral argument in this matter, that Mrs. Wilson was a covert operative for the CIA, see Mot. Hearing Tr. 19:12-15, and the Supreme Court has explained that "Totten's core concern" -- "preventing the existence of the plaintiff's relationship with the Government from being

revealed" -- is not implicated in "a suit brought by an acknowledged (though covert) employee of the CIA." Tenet, 544 U.S. at 10. The principles underlying Totten might yet have special applicability to specific causes of action, however. For example, in order to prevail on the merits of their equal protection claim, plaintiffs would have to allege and eventually demonstrate "disparate treatment of similarly situated parties." 3833 Conn. LLC v. District of Columbia, 336 F.3d 1068, 1075 (D.C. Cir. 2003). In other words, plaintiffs would need to introduce evidence pertaining to the Government's treatment of other covert agents whose espionage relationships have not been acknowledged -- evidence that might reveal the identities of those agents.[7] Ultimately, however, although the Totten doctrine might not altogether preclude plaintiffs' action on its own accord, the principles reflected in the doctrine weigh in the special-factors analysis for two reasons.

First, as explained above, Bivens remedies are context-specific. As the Supreme Court has observed, "there are varying levels of generality at which one may apply 'special factors' analysis." United States v. Stanley, 483 U.S. 669, 681 (1987); see also Wilkie,

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[7] Alternatively, this claim might be subject to dismissal under the state-secrets doctrine, assuming that the United States properly asserted the privilege. See, e.g., Sterling v. Tenet, 416 F.3d 338, 346-48 (4th Cir. 2005); Linder v. Dep't of Defense, 133 F.3d 17, 23 (D.C. Cir. 1998). However, the Supreme Court has confirmed that in certain circumstances the state-secrets doctrine provides insufficient protection for intelligence sources, and dismissal under Totten is required: "The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable . . . ." Tenet, 544 U.S. at 11.

551 U.S. at ___, 127 S. Ct. at 2604. Yet courts have consistently avoided focusing on the specific facts of a given case when determining whether to recognize an implied damages remedy. See, e.g., Stanley, 483 U.S. at 681 ("A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters."); Spagnola, 859 F.2d at 228 ("[T]he Court regards a case-by-case examination of the particular administrative remedies available to a given plaintiff as unnecessary."). For example, the D.C. Circuit declined to recognize a Bivens action by foreign nationals for allegedly unconstitutional actions taken abroad because "as a general matter the danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist." Sanchez-Espinoza, 770 F.2d at 209 (emphasis added). The court did not consider whether "the present litigation [was] motivated by considerations of geopolitics rather than personal harm," or whether the particular suit would actually result in the obstruction of foreign policy. Id. But, although Totten would not require the dismissal of all of plaintiffs' claims here, there may well be situations in which a Bivens claim for the intentional disclosure of a covert operative's status would directly implicate the Totten doctrine. This possibility, which arises because the alleged public disclosure of information pertaining to covert identity does not equate to official government recognition of an espionage relationship, weighs

generally against recognizing a Bivens claim in this context.

Second, even those claims that do not fall directly under the Totten doctrine will inevitably require judicial intrusion into matters of national security. For example, in this case plaintiffs have alleged that "Mrs. Wilson was impaired in her ability to carry out her duties at the CIA." Am. Compl. ¶ 43. This statement not only speaks to her injuries generally but also relates to the merits of her Fifth Amendment deprivation of property claim, at least under certain legal theories. See O'Donnell v. Barry, 148 F.3d 1126, 1140-41 (D.C. Cir. 1998) (describing Fifth Amendment stigma claims). Plaintiffs' substantive due process claim depends upon whether defendants increased the danger of third-party violence against plaintiffs. See generally Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001). The resolution of these claims therefore might require an exploration into Mrs. Wilson's specific duties as a covert operative. Her class-of-one equal protection claim would necessitate an even broader investigation into CIA practices. Plaintiffs argue that the United States could invoke the state secrets privilege or utilize other established methods for the protection of sensitive information. But, in this and in future cases, "[s]uch procedures, whatever they might be, still entail considerable risk" of revealing sensitive information. Sterling, 416 F.3d at 348; see also Sims, 471 U.S. at 175 ("Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering."). At least one other district court has accordingly denied a Bivens remedy in light of the risks incurred

by discovery into issues of national security. See Arar v. Ashcroft, 414 F. Supp. 2d 250, 281-83 (E.D.N.Y. 2006) (denying constitutional claims premised on "extraordinary rendition" of plaintiff to Syria).

Such potential difficulties associated with claims based on the disclosure of information relating to covert CIA operatives gives the Court reason to pause before extending Bivens to this context. "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Egan, 484 U.S. at 530 (citing Chappell v. Wallace, 462 U.S. 296 (1983)). Here, given that Congress has not provided a private right of action for the disclosure of a covert operative's identity, and in light of the "host of considerations that must be weighed and appraised" in deciding whether to imply such an action directly under the Constitution, Sanchez-Espinoza, 770 F.2d at 208, the nature of the information disclosed in this suit provides sound reason to hesitate before judicially implying a Bivens remedy. Cf. Wilkie, 551 U.S. at ___, 127 S. Ct. at 2604-05 (declining to recognize Bivens remedy because of "difficulty of devising a workable cause of action" and observing that "any damages remedy . . . may come better, if at all, through legislation").

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In sum, the Court finds that the existence of special factors counsels against judicial implication of plaintiffs' Bivens claims in this setting.

Accordingly, there is no need to address defendants' alternative arguments for dismissal of these claims, including their assertions of qualified immunity and the Vice President's claim of absolute immunity.

II. Public Disclosure of Private Facts

Plaintiffs have also asserted against all defendants a common-law claim for the public disclosure of private facts, which is a form of the tort of invasion of privacy. This tort claim is based on the same underlying allegations as their Bivens claims -- that defendants caused the publication of the allegedly private fact that Mrs. Wilson was a covert CIA operative – and contends that defendants did so in a manner that would be highly offensive to a reasonable person of ordinary sensibilities. See Am. Compl. ¶¶ 65-68.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, 28 U.S.C. § 2679 (2000), provides the exclusive remedy for a claim of damages arising from any "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." § 2679(b)(1). The Act thus "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." Osborn v. Haley, 549 U.S. ___, 127 S. Ct. 881, 887 (2007). Upon certification by the Attorney General or his designee that the individual defendant was acting within the scope of his office or employment, the United States is substituted as the sole defendant, and the action proceeds under the

Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680 (2000). See § 2679(d)(1). A scope-of-employment certification has been filed in this action on behalf of all defendants. See U.S. Mot. to Dismiss Ex. 1 (Certification of Scope of Employment); see also 28 C.F.R. § 15.4 (2005). The United States has also filed a motion to dismiss the tort claim on the ground that plaintiffs have failed to exhaust their administrative remedies under the FTCA.

Plaintiffs challenge the Westfall certification in this action. The scope-of-employment certification is subject to judicial review. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 420 (1995). However, the certification "must be respected unless and until the District Court determines that [the original defendant], in fact, engaged in conduct beyond the scope of his employment." Osborn, 127 S. Ct. at 900. In other words, the Westfall certification "constitute[s] prima facie evidence that the employee was acting within the scope of his employment." Council on Am. Islamic Relations v. Ballenger ("CAIR"), 444 F.3d 659, 662 (D.C. Cir. 2006) (per curiam). Hence, "a plaintiff challenging the government's scope-of-employment certification bears the burden of coming forward with specific facts rebutting the certification." Stokes v. Cross, 327 F.3d 1210, 1214 (D.C. Cir. 2003) (internal quotation marks omitted). The plaintiff must "raise a material dispute" regarding the certification "by alleging facts that, if true, would establish that the defendants were acting outside the scope of their employment." Id. at 1215. "If there is a material dispute as to the scope issue the district court must

resolve it at an evidentiary hearing." Kimbro v. Velten, 30 F.3d 1501, 1509 (D.C. Cir. 1994).

The ensuing scope-of-employment inquiry is governed by the law of agency as applied in the District of Columbia, where the tort allegedly occurred. See Stokes, 327 F.3d at 1214. "As its framework for determining whether an employee acted within the scope of employment, the Court of Appeals for the District of Columbia looks to the Restatement (Second) of Agency (1957)." Majano v. United States, 469 F.3d 138, 141 (D.C. Cir. 2006) (internal quotation marks omitted).

> Under the Restatement, an employee's conduct falls within the scope of employment if: 1) it is of the kind of conduct he is employed to perform; 2) it occurs substantially within the authorized time and space limits; 3) it is actuated, at least in part, by a purpose to serve the master; and 4) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

Id. at 141 (citing Restatement (Second) of Agency § 228). The fourth Restatement element is irrelevant in this action because plaintiffs have not alleged the use of force. The remaining three elements are contested by plaintiffs, however, and will be considered by the Court in turn.

With respect to the first Restatement element, plaintiffs argue that defendants' actions were

different in kind from that authorized because their conduct was illegal and "placed the national security at risk." Pls.' Opp'n at 36. As plaintiffs describe the conduct at issue, defendants engaged "in a deliberate campaign to discredit and punish Mr. Wilson for his constitutionally protected public statements by intentionally disclosing classified information." Id. The test for this element of the scope-of-employment inquiry is disjunctive: defendant's conduct is of the kind he or she was employed to perform if it was either "'of the same general nature as that authorized' or 'incidental to the conduct authorized.'" CAIR, 444 F.3d at 664 (quoting Haddon v. United States, 68 F.3d 1420, 1424 (D.C. Cir. 1995)). By focusing on the alleged public disclosure of Mrs. Wilson's covert status, plaintiffs have therefore taken too narrow a view of the relevant conduct. D.C. agency law "directs courts to look beyond alleged intentional torts" when assessing whether the actions were of the kind authorized. Id. Instead, the "proper inquiry . . . 'focuses on the underlying dispute or controversy, not on the nature of the tort, and is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf.'" Id. (quoting Weinberg v. Johnson, 518 A.2d 985, 992 (D.C. 1986)). In short, plaintiffs cannot rebut the Westfall certification simply by arguing that defendants' actions were illegal. See Ramey v. Bowsher, 915 F.2d 731, 734 (D.C. Cir. 1990) (per curiam) ("[I]f the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed . . . .").

The CAIR case is illustrative. The Council on American-Islamic Relations ("CAIR") brought an action for defamation and slander against Congressman Cass Ballenger based on his statement that CAIR was the fund-raising arm of a foreign terrorist organization. 444 F.3d at 662. Ballenger made the statement to a reporter during a conversation about Ballenger's marital difficulties. See id. The district court accepted the Attorney General's Westfall certification and dismissed the case. See id. at 663. On appeal, CAIR argued (like plaintiffs do here) that Ballenger's tortious act -- the allegedly defamatory statement -- was not conduct of the kind he was authorized to perform. Id. at 664. The court of appeals explained that CAIR's argument ignored the possibility that the statement was made incidentally to authorized conduct and clarified that the relevant "underlying dispute or controversy" for purposes of the scope-ofemployment inquiry "was the phone call between Ballenger and [the reporter] discussing the marital separation" Id. "The appropriate question, then, [was] whether that telephone conversation -- not the allegedly defamatory sentence -- was the kind of conduct Ballenger was employed to perform." Id. The court held that it was. See id. ("Speaking to the press during regular work hours in response to a reporter's inquiry falls within the scope of a congressman's 'authorized duties.'").

As CAIR makes clear, this Court must look beyond the alleged disclosure of Mrs. Wilson's covert identity and assess whether the underlying conduct was of the type defendants were employed to perform. The proper inquiry in this Court's view,

then, is whether talking to the press (or, in Cheney's case, participating in an agreement to do so, see Am. Compl. ¶ 24) in order to discredit a public critic of the Executive Branch and its policies is within the scope of defendants' duties as federal employees. See Am. Compl. ¶ 3. The alleged means by which defendants chose to rebut Mr. Wilson's comments and attack his credibility may have been highly unsavory. But there can be no serious dispute that the act of rebutting public criticism, such as that levied by Mr. Wilson against the Bush Administration's handling of prewar foreign intelligence, by speaking with members of the press is within the scope of defendants' duties as high-level Executive Branch officials.[8] Thus, the alleged tortious conduct, namely the disclosure of Mrs. Wilson's status as a covert operative, was incidental to the kind of conduct that defendants were employed to perform.

Plaintiffs' arguments with respect to the third element of the scope-of-employment test -- whether the conduct is actuated by a purpose to serve the master -- suffer from the same flawed focus on the tort itself rather than the underlying conduct. Plaintiffs observe, undoubtedly correctly, that the unauthorized disclosure of classified information, and in particular of the identity of a covert agent, can never be in the interest of the United States. But, like the inquiry into the kind of conduct

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[8] Armitage, as Deputy Secretary of State, was accorded "all authorities and functions vested in the Secretary of State." Delegation of Authority 245, 66 Fed. Reg. 22,065, 22,065 (May 2, 2001).

authorized, the "'intent criterion focuses on the underlying dispute or controversy, not on the nature of the tort, and it is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf.'" Stokes, 327 F.3d at 1216 (quoting Weinberg, 518 A.2d at 992). Furthermore, "even a partial desire to serve the master is sufficient" to satisfy the requirement. CAIR, 444 F.3d at 665. Plaintiffs have alleged that defendants' conversations with reporters were intended, at least in part, to discredit Mr. Wilson. Am. Compl. ¶ 2. The Court finds that attempts by high-ranking officials to discredit a critic of the Executive Branch's policies satisfy the Restatement's purpose requirement.

Finally, the second element of the scope-of-employment inquiry looks to whether the alleged conduct occurs substantially within authorized time and space limits. Plaintiffs concede that this element is satisfied as to Armitage, who allegedly met with reporters in his State Department office. Plaintiffs admittedly have not alleged the time and place of the otherdefendants' actions; they now argue that discovery is necessary to determine those facts. But "[n]ot every complaint will warrant further inquiry into the scope-of-employment issue." Stokes, 327 F.3d at 1216. In order to obtain discovery, plaintiffs must first "plead sufficient facts that, if true, would rebut the certification." Id. To allow discovery based on the absence of factual allegations in plaintiffs' complaint would turn this standard on its head.

In any event, there would seem to be little utility in applying the concept of authorized time

and space limits to high-level government officials such as the Vice President, his Chief of Staff, and a close advisor to the President. As the United States observed in its reply brief, the "Vice President does not turn into a private citizen on Sundays." U.S. Reply in Support of Mot. to Dismiss at 8-9. The amended complaint underscores this very point: it alleges, for example, that before Libby spoke with reporters Cooper and Miller on Sunday, July 12, 2003, he had flown that morning with Vice President Cheney and "other officials" on Air Force Two and discussed with those officials how to respond to media inquiries. Am. Compl. ¶ 19(v). The bare assertion that these actions took place on a Sunday -- a day on which plaintiffs also allege that at least some official government business had taken place -- is not sufficient to rebut the certification that the actions occurred within the scope of employment.

In sum, the Court finds that plaintiffs have not pled sufficient facts that, if true, would rebut the Westfall certification filed in this action. Hence, neither further discovery nor an evidentiary hearing on the scope-of-employment issue is warranted, and the United States is substituted as the sole defendant for the claim of public disclosure of private facts. Furthermore, plaintiffs have not contested defendants' assertions that they have not exhausted their administrative remedies as required by the FTCA. See § 2679(d)(4); § 2675(a) ("An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing . . . .").

This Court therefore lacks subjectmatter jurisdiction over plaintiffs' tort claim for public disclosure of private facts. See Jackson v. United States, 730 F.2d 808, 809 (D.C. Cir. 1984) (per curiam).[9]

CONCLUSION

For the reasons given above, plaintiffs have failed to state a claim upon which relief can be granted with respect to their four causes of action asserted directly under the Constitution. Furthermore, this Court lacks subject-matter jurisdiction over plaintiffs' claim for public disclosure of private facts. Accordingly, defendants' motions to dismiss are granted. A separate order accompanies this memorandum opinion.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: July 19, 2007

[9] Given this Court's lack of subject-matter jurisdiction over the tort claim, this opinion will not address defendants' alternative arguments, including their statute-of-limitations defense, as to why the claim fails as a matter of law.

Entered July 19, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE PLAME WILSON, et al.,

Plaintiffs,

v.

I. LEWIS LIBBY, JR., et al.,

Defendants.

Civil Action No. 06-1258 (JDB)

ORDER

Upon consideration of defendants' motions to dismiss, the statement of interest and motion to dismiss filed by the United States, plaintiffs' opposition thereto, and the entire record herein, and for the reasons given in the memorandum opinion issued on this date, it is this 19th day of July, 2007, hereby

ORDERED that the motions to dismiss filed by the United States [#28] and by defendants Richard B. Cheney [#21], I. Lewis Libby, Jr. [#22], Richard L. Armitage [#26], and Karl C. Rove [#27] are **GRANTED**; and it is further

ORDERED that this action is **DISMISSED**.

/s/ John.D. Bates
JOHN D. BATES
United States District Judge

Entered November 17, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5257

September Term 2008
06cv01258
Filed On:

Valerie Plame Wilson and Joseph C. Wilson, IV,

Appellants

v.

I. Lewis Libby, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Henderson and Rogers*, Circuit Judges

ORDER

Upon consideration of appellants' petition for panel rehearing filed on September 26, 2008, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Michael C. McGrail
Deputy Clerk

* Circuit Judge Rogers would grant the petition for rehearing.

Entered November 17, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5257

September Term 2008
06cv01258
Filed On:

Valerie Plame Wilson and Joseph C. Wilson, IV,

Appellants

v.

I. Lewis Libby, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers**, Tatel, Garland*, Brown, Griffith, and Kavanaugh*, Circuit Judges

ORDER

Appellant's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Michael C. McGrail
Deputy Clerk

*Circuit Judges Garland and Kavanaugh did not participate in this matter.

**Circuit Judge Rogers would grant the petition for rehearing en banc.